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A

TREATISE

ON THE

LAW OF PARTNERSHIP.

BY

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THIRD EDITION.

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PREFACE

TO THE LAW OF PARTNERSHIP.

I HAVE followed the same plan in this as in my former works; judging, from the favor they meet with and all I can learn about them, that it is satisfactory to the profession.

It may be briefly described thus: In the text, I state the law as clearly and succinctly as I can; enlarging upon the reasons and principles involved, when I treat of questions more than usually important, difficult, or uncertain. In the notes, I give all that the complete library of this Law School could supply me with, of authorities needed to verify the law as stated, or exhibit the qualifications or modifications to which it is subject, and enable an inquirer, with a library at command, to make a thorough investigation of any question. The great and still growing increase in the number of reports makes it very difficult for any individual to have a full collection of them; and leads me to believe, that a work intended, on the one hand, to supply on its specific subjects the want of a library so far as any single work can hope to do this, and, on the other, to facili-

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tate the use of a complete library for those who have access to one, will be found useful to students and practitioners.

This work has been long in hand; and would have been published some years ago, had I not thought, with my publishers, that it was better to wait for peace. I shall not regret this delay, if it has enabled me, by additional labor and the use of recent authorities, to offer it in a less defective condition to the profession, whose kind reception of my other works gives me so much cause for gratitude.

CAMBRIDGE, 1867. T. P.

PREFACE

TO THE THIRD EDITION.

IN this edition, the Law of Partnership is brought down to the present time, — it is hoped, accurately and fully. About four hundred cases have been selected from those decided since the last edition; which either present new points, or illustrate or modify earlier decisions.

T. P.

CONTENTS.

THE PAGES REFERRED TO ARE THE STAR PAGES.

CHAPTER I.

PAGE

Of the Origin and Purpose of Partnership 1

CHAPTER II.

What Partnership is and how it is made 6

Sec. I. What partnership is 6

Sec. II. How partnership may be made 6

CHAPTER III.

Of Partners 16

Sec. I. Who may be partners 16

1. Infants 17
2. Married women 23
3. Of aliens 27
4. Of the insane and persons under guardianship, 28
5. Of corporations 29

Sec. II. Of the kinds of partners 30

1. Ostensible or public partners 30
2. Secret or unknown partners 30
3. Nominal partner 31
4. Silent partner 32
5. Dormant partner 33
6. Retiring partner 34
7. Incoming partner 34
8. General partner 34
9. Special partner 35

CHAPTER IV.

Of the Purposes and Kinds of Partnership 36

CHAPTER V.

Who are Partners as to each Other 40

CHAPTER VI.

Who are Partners as to Third Parties 61
Sec. I. General grounds of liability 61
Sec. II. When a person is liable as actual partner . . . 66
Sec. III. How far stipulations between the partners affect third parties 93
Sec. IV. When credit is given to one partner only . . . 103
Sec. V. When a person is liable because he is held out as a partner 115
Sec. VI. Of liabilities arising from annuities, loans, leases, or trusts 136
Sec. VII. How far partners are liable *in solido* for the torts of other partners 150

CHAPTER VII.

Of the Rights and Duties of Partners between Themselves 150
Sec. I. Of the right of choice as to partner 159
Sec. II. Of the right of assigning or transferring property 162
Sec. III. Of the foundation and general extent of the power of a partner 170
1. Of the foundation of this power 170
2. Of the general extent of this power . . . 171
3. Of the power to submit to arbitration . . 176
4. Of the power to affix a seal 178
5. Of the representations or admissions of a partner 184
6. Of the power to vary the business of a partnership 197
Sec. IV. Of negotiable paper 199
Sec. V. Of the power of a majority of the partners . . 218
Sec. VI. Of the conduct which partners may require of each other 222
1. Of good faith 222
2. How far a partner may transact independent business 227

3. How the accounts of the firm shall be kept, 228
4. Of a partner's right to extra compensation . 229
5. How far partners are trustees 231
Sec. VII. Of the articles of copartnership 231
1. General principles of the construction and effect of articles 231
2. Bill in equity for specific performance of articles 234
3. Of waiver of provisions in the articles . . 238
4. Of renewal of a partnership 239
5. Of provisions for advances by a partner . . 240
6. Of provision as to the accounts 242
7. Provisions for giving care and skill and time to the partnership 243
8. Of provisions for a dissolution 244
9. Of provisions for the determination of differences by arbitration; for the powers of a majority; or for division of profits . . . 247
10. Of provision for damages for misconduct of a partner 250
11. Of provisions for appropriation of property to a partner 252
12. Of provisions respecting the name of the firm 254
Sec. VIII. Of the rights of property of the partners *inter se*, 256
1. What constitutes partnership property . . 256
2. Of the good-will, and of trade-marks, copyrights, and patent-rights 261
3. Of the trade name 265

CHAPTER VIII.

On the Remedies of Partners inter se 267
Sec. I. General considerations 267
Sec. II. Of questions between partners of which the courts of law take cognizance 270
1. Of demands distinct from the affairs of the partnership 270
2. Of a demand founded upon a balance of account stated 278
3. Of a demand for contribution 285
Sec. III. Of questions between partners cognizant only by courts of equity 288

1. Demands between firms having a common member 288
2. Of the demand of a firm grounded on the tort of a member thereof 293
Sec. IV. On the methods and processes of equity applicable in cases of partnership 297
1. Of a decree for specific performance . . . 297
2. Of a decree for a dissolution and for an account 299
3. Of a decree for an injunction 302
4. Of a decree for a receiver 312
Sec. V. Of torts between partners 321

CHAPTER IX.

Of Remedies by Partners against Third Parties . . 325
Sec. I. Of remedies for breach of contract 335
Sec. II. Of the remedies of partners against third parties for torts 337

CHAPTER X.

Of the Remedies of Third Persons against the Partnership and against Partners 342
Sec. I. Of the appropriation of the property to the debts, 342
Sec. II. Of the suit, attachment, and levy of a private creditor against a partner personally indebted to him 350

CHAPTER XI.

Of the Real Estate of a Partnership 362
Sec. I. General considerations 362
Sec. II. When and by what means real estate becomes partnership property 363
Sec. III. How courts of law treat the real estate of a partnership 366
Sec. IV. How the real estate of a partnership is treated in equity 369
1. How far it is regarded as personal estate . 369
2. Of dower in such real estate 372
3. Of the inheritance of such real estate . . . 373
4. Of the right of creditors of the firm to its real estate 375

5. Of the right and power of the partners as to the real estate of the partnership . . . 376
Sec. V. Of conveyances to strangers of the real estate of the partnership 377

CHAPTER XII.

Of Dissolution 379
Sec. I. Of the extent and duration of a partnership . . 379
Sec. II. Of dissolution by a provision in the articles . . 380
Sec. III. Of dissolution by the will of all the partners . . 384
Sec. IV. Of the general effects of a dissolution 386
1. Of its effects on the interest or rights of partners 386
2. Of winding up the concern 388
3. Of the effect of a dissolution upon third parties 394
4. Of actions and remedies after a dissolution . 398
Sec. V. Of dissolution by the act of a part of the firm only, 399
1. What acts dissolve a partnership 399
2. At what time and in what manner a partner may terminate a partnership 401

CHAPTER XIII.

Of a Change in the Partnership 406
Sec. I. Of the effect of any change in the partnership . 406
Sec. II. Of a retiring partner 408
1. How retirement, of itself, affects the liability of the partner 408
2. Of notice 410
3. When the retiring partner is discharged by the creditors 421
4. When the retiring partner is discharged by appropriation of payment 427
Sec. III. Of an incoming partner 433
Sec. IV. Of the death of a partner 438
1. Dissolution by death 438
2. Of the powers and interest of the surviving partners 440
3. Of the settlement of the estate of a deceased partner 447
4. When the deceased has made his partner his executor 450
5. When a power of appointment is given by the articles 451

CHAPTER XIV.

Of Dissolution by Decree 457
1. Of a decree for misconduct of a partner . . 457
2. Of a decree where misconduct is not charged, 460

CHAPTER XV.

Of Bankruptcy 469
Sec. I. When and how a bankruptcy dissolves a partnership 469
Sec. II. Of the effect of the bankruptcy of a partner upon solvent partners 471
Sec. III. How the funds are appropriated to the debts . . 480
Sec. IV. What debts or funds are joint, and what are several, 484
Sec. V. Of a sale of the effects in bankruptcy 506

CHAPTER XVI.

Of an Account 508
Sec. I. When an account will be ordered 508
Sec. II. Of opening an account for error 513
Sec. III. How an account should be taken 519

CHAPTER XVII.

Of Limited Partnership 526

CHAPTER XVIII.

Of Joint-stock Companies 541

CHAPTER XIX.

Of Part-owners of Ships 548
Sec. I. Of the peculiar nature of part-ownership of ships, 548
Sec. II. Of the rights and obligations of part-owners of ships in relation to each other 553
1. Of repairs, sale, insurance, and the like . . 553
2. Of the employment of the ship 558
3. Of the lien of part-owners of ships 563

SEC. III. Of the rights and obligations of part-owners of ships as to third parties 564
1. Of the power of a part-owner to represent the owners 564
2. Of the ship's husband 569
3. Of mortgagees, mortgagors, and charterers . 570
4. How far part-owners are bound for the torts of each other or of their servants . . . 571

INDEX TO CASES CITED.

THE PAGES REFERRED TO ARE THE STAR PAGES.

A.

	PAGE
Abat *v.* Penny	407
Abbot *v.* Bayley	24
v. Johnson	222
Abbott *v.* Smith	273, 285, 286, 295, 350
Abbott's Appeal	372
Abel *v.* Sutton	391, 411, 413
Abell, *Ex parte*	482, 493
v. Forgue	173
Aberfoyle, The	572
Abpt *v.* Miller	203
Achley *v.* Stachlin	112
Ackerman, *Ex parte*	483
Adam, *Ex parte*	22, 491, 499
Adams, *Ex parte*	480, 500, 501, 502
v. Bankart	176, 177, 182
v. Carter	44
Adams Bank *v.* Rice	7
Addams *v.* Tutton	385
Adderley *v.* Dixon	235
Addis *v.* Knight	349, 448
Addison *v.* Overend	337
Aflalo *v.* Fourdrinier	502
Agace, *Ex parte*	111, 112, 113, 175
Agawam Bank *v.* Morris	489
Agnew *v.* Johnson	323
v. Platt	474
Akhurst *v.* Jackson	241, 296, 503
Ala. Coal Mining Co. *v.* Brainard	201
Albers *v.* Wilkinson	179
Albretcht *v.* Sussman	28, 327
Alcock *v.* Taylor	382, 401
Alder *v.* Fouracre	307
Alderson *v.* Pope	95, 120, 196
Aldrich *v.* Grimes	19
Alexander, *Ex parte*	292
v. Barker	172, 291, 334, 501
v. Dowie	552
v. Heriot	19
v. Hutcheson	19
v. Kimbro	365
v. Stern	175
Alexandria *v.* Patten	427, 428
Alfele *v.* Wright	168
Alger *v.* Thacher	410
Allcott *v.* Strong	12, 194, 429, 432
Allegre *v.* Insurance Co.	248
Allen *v.* Blanchard	36
v. Centre Vale Co.	345, 353
v. Coit	213, 522
v. Davis	36, 44, 144
v. Dunn	59, 360
v. Farrington	173
v. Hill	440
v. Kilbre	506
v. Owens	196
v. Rostain	7
v. Wells	348, 349, 352, 421, 449, 482
v. White	135, 292, 329
Allfrey *v.* Allfrey	515
Alliance Bank *v.* Keasley	175
Alsop *v.* Mather	455
Alter *v.* Brook	353
Alvord *v.* Smith	12, 162
Ambler *v.* Bradley	42, 89
v. Whipple	458
v. Wilson	458
American Bank *v.* Doolittle	173
American Bank Note Co. *v.* Edson	243
American Linen Thread Co. *v.* Wortendyke	411
Ames *v.* Downing	442, 443, 528, 536
Amiable Nancy, The	572
Amidown *v.* Osgood	413, 414, 415
Amory *v.* Francis	489
Amoskeag Manufacturing Co. *v.* Spear	265
Amphlett *v.* Hubbard	494
Anders *v.* Meredith	556
Anderson *v.* Anderson	458
v. Clay	7
v. Henshaw	110
v. Lemon	226
v. Levan	65, 108, 133, 194
v. Maltby	142, 492
v. Moncrieff	287
v. Taylor	229, 394
v. Tompkins	163, 164, 166, 183, 510
v. Wallace	304
v. Wanzer	196
v. Weston	413
Andrew *v.* Boughey	487

Andrews *v.* Brown 364, 368, 373, 376
v. Ellison 276, 297
v. Essex F. & M. Ins. Co. 11
v. Garstin 7
v. Keith 343
v. Planters' Bank 216
v. Schott 100, 535, 538
Anger *v.* Price 25
Anna Maria, The 572
Annett *v.* Carstairs 553
Anonymous (2 Ca. Ch.) 175, 309, 559
(2 Eq. Abr. 12) 517
(2 Hayw.) 178
(1 Madd. Ch.) 236
(12 Mod. 446) 172, 173, 472
(Skinner, 230) 562
(Styles, 370) 1, 199
(Taylor, 113) 178
(1 Ves. 476) 310
(2 Ves. 629) 13, 236
(2 Ves. Sen. 630) 235, 236
(16 Vin. Abr.) 163
(W. Jones, 253) 337
v. Layfield 1, 172, 217
Ansell *v.* Waterhouse 158, 273, 286, 287
Anten *v.* Ellingwood 44
Anthon *v.* Fisher 28
Anthony *v.* Butler 180
Apollo, The 558, 559, 561
Appeal of Second Nat. Bank 371
Appeal of the York Co. Bank 345, 346
Apperly *v.* Page 512
Appleby, *Ex parte* 426, 487
Apsey, *Ex parte* 155
Arbonin, *Ex parte* 491, 496, 497
Archibald *v.* Mercantile Ins. Co. 11
Arden *v.* Sharpe 199, 201, 212
v. Tucker 334
Argall *v.* Smith 539
Arkwright, *Ex parte* 497
Arlington *v.* Merrick 332, 333
Armsby *v.* Farnam 330, 423
Armstrong *v.* Armstrong 9
v. Falmestock 168
v. Hussey 63, 415
v. Lewis 9, 10
v. Robinson 178
Arnold *v.* Brown 163, 210, 400, 461, 470
v. Camp 111, 424
v. Del Col 572
Artisans' Bank *v.* Treadwell 533, 535, 538
Arton *v.* Booth, 174, 175, 325
v. Lond. & N. W. R. R. Co. 330, 358, 385, 400
Ashton *v.* Robinson 365
Aspinwall *v.* Williams 13, 118, 125
Astley *v.* Weldon 252
Atherton *v.* Tilton 86
Atkins *v.* Atkins 476
v. Hunt 6
v. Tredgold 185, 186, 187, 188, 451
Atkinson *v.* Farmers' Bank 476
v. Foster 551
v. Laing 292, 330, 331, 398
v. Mackreath 152, 267
v. Maling 550, 571
Atkyns *v.* Rinnier 252
Attorney-General *v.* Brooksbank 520
v. Burgess 156, 157
v. Heelis 544
v. Mackreth 47
v. Parnther 28
v. Siddon 156
v. Stranyforth 156
v. Wilson 287
Attwater *v.* Fowler 278, 520
Attwood *v.* Banks 110
v. Rattenbury 334
Atwood *v.* Gillett 193
Aubert *v.* Maze 10, 287
Auld *v.* Butcher 511
Ault *v.* Goodrich 187, 223, 395, 451
Austin *v.* Bostwick 189, 192
v. Holland 413
v. Vandermark 216
v. Walsh 331
v. Williams 13, 118
Averill *v.* Lyman 173, 423
Avery *v.* Lauve 14, 15
Axe *v.* Clarke 309
Ayer *v.* Tilden 230
Ayrault *v.* Chamberlin 416, 435

B.

Babb *v.* Read 544
Babcock *v.* Brashear 447
v. Stewart 435
v. Stone 212, 289, 326
Babonneau *v.* Farrell 338
Bachurst *v.* Clinkard 342, 353
Backus *v.* Murphy 481
v. Richardson 338
Badlam *v.* Tucker 571
Bagley *v.* Peddie 251, 252
Bagshaw *v.* Parker 465
Bailey *v.* Clark 60, 96, 142
v. Ford 459
v. Lyman 328
v. Moore 509
v. Starke 271, 275, 285
Bailiffs, &c. *v.* Trinity House 572
Bainbridge *v.* Wilcocks 516
Baird *v.* Baird 299, 512
v. Cochran 112, 203
Baker, *Ex parte* 489
v. Biddle 514, 516
v. Charlton 120, 122, 214, 223
v. Jewell 331
v. Plaskitt 542
v. Rappier 122, 124
v. Ruchtrieb 39
v. Stackpoole 193

Baker *v.* Wheaton 474
Baker's Appeal 345
Baldney *v.* Ritchie 290, 554, 566
Baldwin *v.* Johnson 377
v. Useful Knowledge Society 298
Ballou *v.* Spencer 45
Ballum *v.* Price 173
Balmain *v.* Shore 159, 439
Balmer, *Ex parte* 9
Baltzell *v.* Trump 230
Bamford *v.* Barron 496
Banchor *v.* Cilley 148
Bandier, *Ex parte* 483
Bangor *v.* Warren 486, 567
Bank, *Ex parte* 174
v. Carrolton 353
v. Horn 471
Bank, Canadian *v.* Wilson 201
First Nat. *v.* Breese 201
Bankhead *v.* Alloway 201
Bank of Chenango *v.* Osgood 173
v. Root 197
Commonwealth *v.* Mudgett 418
England, *Ex parte* 491, 499
Kentucky *v.* Brooking 200, 212, 216, 233
v. Keizer 482
Louisville *v.* Hale 365
Mobile *v.* Andrews 439
New York *v.* Vanderhorst 438
Port Gibson *v.* Baugh 391
Rochester *v.* Bowen 216
v. Monteath 126, 128, 129, 130, 200, 233
St. Marys *v.* St. John 33, 292
Scotland *v.* Christie 422
South Carolina *v.* Humphreys 391, 419
Tennessee *v.* Saffarans 205, 216
the United States *v.* Davis 420
Vergennes *v.* Cameron 193, 212, 216
Banks, *Ex parte* 491
v. Gould 320
v. Mitchell 289, 325
Bannatyne *v.* Leader 496
Barber *v.* Backhouse 112, 207
v. Hartford Bank 449
Barclay, *Ex parte* 487
v. Gooch 287
v. Lucas 332
v. Phelps 489
Bardwell *v.* Perry 348, 349, 352, 376
Barfoot *v.* Goodall 419
Bargate *v.* Shortridge 162
Baring *v.* Crafts 128, 423
v. Dix 381, 458, 459, 467
v. Lyman 289
Barker *v.* Blake 111, 423, 429
v. Burgess 112
v. Buttress 451
v. Goodair 309, 461, 469, 471, 472, 474, 476, 481, 506
v. Parker 332, 455, 505
v. Richardson 174, 175
Barklie *v.* Scott 18, 145, 147
Barlow *v.* Reno 179
v. Wiley 23
Barnadiston *v.* Chapman 556
Barnes *v.* Bartlett 556
Barnett, *Ex parte* 497
v. Lynch 158
v. Smith 60, 132
Barney *v.* Currier 196
v. Smith 447
Barnley *v.* Rice 199
Barnstead *v.* Empire Mining Co. 457, 510
Barratt *v.* Collins 338
Barrett *v.* McKenzie 353
v. Swann 55, 202
Barringer *v.* Sneed 193
Barrow, *Ex parte* 11, 53, 160, 169
v. Rhinelander 513
Barry *v.* Nesham 58, 78
Barson *v.* Kincaid 173
Barstow *v.* Adams 471
v. Gray 292
Bartle *v.* Coleman 10
Bartlett *v.* Jones 50, 85
v. Walter 548
Barton *v.* Hanson 104, 118
v. Williams 45, 163, 323, 355, 556
Barwis, *Ex parte* 22
Bascom *v.* Young 172, 175
Bass *v.* Estill 349
v. Taylor 339
Batard *v.* Hawes 273
Bate, *Ex parte* 491
Batson, *Ex parte* 484, 500, 502
Battaile *v.* Battaille 535
Battersby *v.* Smyth 556
Battley *v.* Bailey 14
Batty *v.* M'Cundie 95
Bawden *v.* Howell 334
Baxter *v.* Clark 63, 96
v. Connoly 262
v. Plunkett 201
v. Rodman 59, 82
v. West 457
Baylis *v.* Dineley 18
Beach *v.* Hayward 292, 447
v. Hotchkiss 270, 278, 282, 331
v. State Bank 200, 216
Beacham *v.* Eckford 228, 509, 524
Beak *v.* Beak 390, 392, 394, 522
Beale *v.* Caddick 163, 432
v. Hayes 252
v. Mouls 434, 436
Beall *v.* Lowndes 121

Beaman *v.* Whitney 13
Bean *v.* Morgan 24
Beard *v.* Webb 23
Beardsley *v.* Hall 194
Beatty *v.* Bates 36
v. Wray 230, 231, 444
Beaumont *v.* Bramley 513
v. Meredith 37, 458, 467, 545
Beauregard *v.* Case 44
Beaver *v.* Lewis 381
Beck *v.* Martin 172, 175
Beckford *v.* Wade 515
v. Wildman 521
Beckham *v.* Drake 106
v. Knight 106, 565
v. Peay 193, 210
Beckwith *v.* Talbot 44
Bedford *v.* Brutton 275, 276, 297
v. Deakin 397, 422, 424, 425, 485, 488
Beebe *v.* Rogers 105
Beech *v.* Eyre 434
Beecham *v.* Dodd 7, 42, 49, 89
Beecher *v.* Guilburn 225
Beers *v.* Reynolds 532, 536, 538
Beitz *v.* Fuller 188
Beldon *v.* Campbell 568
Belknap *v.* Gibbens 288
Bell, *Ex parte* 10, 287
v. Ansley 336
v. Banks 107, 108
v. Humphries 570
v. Laymans 323
v. Morrison 186, 189, 190, 193
v. Newman 345, 449, 482, 503
v. Phyn 370
Bellairs *v.* Ebsworth 333
Belote *v.* Wynne 190
Belton *v.* Hodges 22
Benedict *v.* Davis 120, 132
Benfield *v.* Solomons 367
Benham *v.* Bishop 19
v. Gray 387
Benjamin *v.* Porteus 77, 145
v. Stremple 324
Bennet, *Ex parte* 473, 489
Bennett *v.* Ames, *In re* 469
v. Marshall 179
v. Russell 223, 229
v. Stickney 174
Bennett's Case 394
Benninger *v.* Clarke 263
Bensley *v.* Bignold 10
Benson, *Ex parte* 499
v. Hadfie 426
v. Heathorn 394, 596
v. M'Bee 39, 52, 57, 100
v. Thompson 554, 565
Bentley *v.* Bates 301, 317
v. Craven 226
v. Harris 63
v. White 39, 52, 99, 100
Benton *v.* Chamberlin 415, 416
Berkeley *v.* Hardy 179
Berkshire *v.* Evans 10
Berley *v.* Rampacher 24
Bernard *v.* Torrance 411, 413, 416
v. Wilcox 292
Berry *v.* Cross 459
Berthold *v.* Goldsmith 86
Besch *v.* Frolick 465, 467
Best *v.* Givens 19
Beste *v.* His Creditors 224
Bethel *v.* Franklin 274
Betts *v.* Bagley 474
Bevan, *Ex parte* 490, 491
v. Lewis 104, 105, 213, 309
Bevans *v.* Sullivan 195, 228, 229
Bewley *v.* Tams 183
Biddlecombe *v.* Bond 247
Bidwell *v.* Madison 71
Biernan *v.* Braches 271
Bigelow *v.* Grannis 19
Bigg, *Ex parte* 491, 499
Biggs *v.* Fellows 477
v. Lawrence 341
Bignold, *Ex parte* 174
v. Waterhouse 102, 175, 196, 420
Bill *v.* Porter 486
Billings *v.* Meigs 210
Binford *v.* Dommett 322, 473, 501
Binney *v.* Le Gal 179
Birch *v.* Stephenson 251
Birchett *v.* Bolling 13, 235, 236
Bird *v.* Caritat 475
v. Hamilton 6, 14
v. Lanius 104
v. McCoy 290
Birdsall *v.* Colie 312, 316
Bisel *v.* Hobbs 63
Bishop *v.* Breckles 404, 458
v. Shepherd 82
Bispham *v.* Patterson 190, 194, 195
Bitzer *v.* Shunk 179
Bixby *v.* Whitney 550
Black *v.* Black 363, 368
v. Bush 345, 350
Black's Appeal 482
Blackburn, *Ex parte* 499
v. McCallister 178
Blackett *v.* Weir 273, 285
Blades *v.* Free 397
Blain *v.* Agar 296
Blair *v.* Bromley 150, 172
v. Snover 331
Blake, *Ex parte* 499
v. Dorgan 381
v. Nutter 363, 364
v. Wheadon 326
v. Williams 474
Blakeley *v.* Graham 277
Blakeney *v.* Dufaur 313, 314, 317, 459
Blanchard, *In re* 552
v. Coolidge 50, 84, 145

Blanchard *v.* Pasteur 109
Bland, *Ex parte* 553, 565, 566, 567, 569
v. Haselrig 185
Blankenhagen, *Ex parte* 491
Blanshard, *In re* 558, 559
Blew *v.* Wyatt 397, 426
Bligh *v.* Brent 546
Blight *v.* Tobin 151
Blin *v.* Pierce 291
Blinn *v.* Evans 205
Blisset *v.* Daniel 223, 234, 245, 400, 402, 407
Blodgett, *In re* 494
v. Weed 103, 201
Blood *v.* Goodrich 179
Bloodgood *v.* Zeily 513, 514
Blount *v.* Hipkins 546
Bloxam *v.* Hubbard 337
Bloxham, *Ex parte* 489
v. Pell 137, 140, 141, 142
Blue *v.* Leathers 44, 144, 280
Blundell *v.* Winsor 395, 542, 543, 544, 545, 547
Boardman *v.* Gore 96, 152
v. Keeler 292, 501
v. Mosman 155
Bobo *v.* Hansell 19
Bocklen *v.* Hardenberg 44
Bodenham *v.* Purchas 432, 523
Bodle *v.* Chenango, &c. Ins. Co. 336
Bogget *v.* Frier 24
Boggs *v.* Curtin 334
Bolitho, *Ex parte* 64, 105, 128, 129, 213
Bolland, *Ex parte* 153, 154
Bolling *v.* Bolling 514
Bolton, *Ex parte* 476
v. Puller 52, 328, 494
Bonbonus, *Ex parte* 101, 112, 113, 205, 206, 208, 499
Bond, *Ex parte* 491, 499
v. Aitkins 105, 107, 181
v. Gibson 163, 164
v. Hays 184
v. Pittard 41, 46, 57, 132, 235
Bonfield *v.* Smith 591
Bonnaffe *v.* Fenner 7, 274
Bonner *v.* Campbell 370
Bonney *v.* Ridgard 515
Bonsall *v.* Conly 494
Bonsteel *v.* Vanderbilt 55
Booth *v.* Clark 315
v. Hodgson 10, 287
v. Meyer 469
v. Parks 239, 240, 401, 441, 443, 523
v. Smith 486
Bosanquet *v.* Wray 52, 244, 288, 290, 325, 326
Boson *v.* Sandford 158
Bostwick *v.* Champion 156
Bosvil *v.* Brander 483
Boswell *v.* Dunning 334
v. Green 163, 166
Botifeur *v.* Weyman 513, 514, 515
Boucher *v.* Lawson 11, 572
Bouldin *v.* Page 196, 420
Boulter *v.* Peplow 273
Bound *v.* Lathrop 188, 196
Bourne *v.* Freeth 132
v. Wooldridge 209
Boussmaker, *Ex parte* 27
Bovill *v.* Hammond 36, 51, 56, 269, 282, 283
Bowas *v.* Pioneer Tow Line 44
Bowden *v.* Schatzell 349, 448
Bowen *v.* Argall 532, 538, 539
v. Mead 203
v. Rutherford 12
Bower *v.* Swadlin 173
Bowker *v.* Burdekin 180
v. Smith 349
Bowman *v.* Bailey 42, 89
Bowyer *v.* Anderson 36, 85, 144
Boyce *v.* Burchard 314
v. Owens 24
v. Watson 195
Boyd *v.* Cann 419
v. Emerson 176, 177
v. Mynatt 238, 463
Boyden *v.* Boyden 19
Boyers *v.* Elliott 372
Boynton *v.* Page 228
Boys *v.* Ancell 251, 252
Boyson *v.* Gibson 550
Bozon *v.* Farlow 263, 264
Brace *v.* Taylor 519
v. Washburn 556
Braches *v.* Anderson 63, 163
Bracken *v.* Kennedy 287, 289, 510
Bracket *v.* Winslow 394
Bradbury, *Ex parte* 487
v. Barnes 367
v. Smith 47, 537, 538
Braden *v.* Gardner 552, 563, 564
Bradford *v.* Kimberly 229, 394, 503
Bradley *v.* Chamberlin 239, 394, 401, 446
v. Harkness 160
v. Holdsworth 546
v. White 84
Bradstreet *v.* Baer 25
Brady *v.* Calhoun 37, 45, 363
v. Hill 193
Braithwaite *v.* Britain 448, 485
Braley *v.* Goddard 86
Brand *v.* Boulcott 272
Brandon *v.* Hubbard 37
v. Nesbitt 28
v. Robinson 473
Brandram *v.* Wharton 186, 188
Brandred *v.* Muzzy 57
Brannon *v.* Hursell 230
Brasier *v.* Hudson 173
Brassington *v.* Ault 292, 501
Bray *v.* Fromont 12, 160, 168, 546
Brazier *v.* Bryant 427

Breckenbridge *v.* Ormsby 18
Breckenridge *v.* Shrieve 100
Bremner *v.* Chamberlayne 434
Brenan *v.* Preston 317, 558
Brenchley, *Ex parte* 502
Brent *v.* Davis 96
v. Hay 564
Bretherton *v.* Wood 158
Brett *v.* Beckwith 348
Brettell *v.* Williams 217
Brewer *v.* Worthington 421
Brewster *v.* Hammet 310, 343
v. Hardeman 190, 192
v. Mott 112, 113, 203, 209, 211, 293
v. Wakefield 234
Brickhouse *v.* Hunter 522
Brickwood *v.* Miller 474
Bridge *v.* Gray 192, 194, 196
v. McCullough 349
Brierly *v.* Cripps 278, 282, 283
Briggs, *Ex parte* 142
v. Vanderbilt 55
v. Wilkinson 552, 553, 569
Brigham, *Ex parte* 435
v. Clarke 44
v. Dana 42, 48, 230
v. Eveleth 273, 281
Bright *v.* Hutton 43
v. Rowland 252
v. Sampson 174
Brimley *v.* Kupfer 279, 284, 523
Brisban *v.* Boyd 193
Briscoe *v.* Anketel 190
Bristow *v.* James 475
v. Taylor 325
v. Towers 27
Broad *v.* Jollyfe 410
Broadbent, *Ex parte* 511
Broadus *v.* Evans 210
Brock *v.* Bateman 348
Brockenbrough *v.* Hackley 189
Brockway *v.* Burnap 85
Brodie *v.* Howard 553, 554, 566
Brooke *v.* Enderby 432
v. Evans 118
v. Washington 63, 364
Brooks *v.* Martin 223
Broom *v.* Broom 364, 374
Broome, *Ex parte* 13, 296, 457, 479, 502
Brophy *v.* Holmes 142
Brothroyd, *In re* 494
Brown, *Ex parte* 105, 108
v. Agnew 280, 285, 287
v. Clark 391
v. Cook 80
v. De Tastet 12, 53, 160, 443, 447, 472, 474, 503, 524
v. Duncan 9
v. Duncanson 203
v. Fifield 25
v. Gordon 426
Brown *v.* Heathcote 168
v. Higginbotham 85
v. Jewett 26, 400
v. Lawrence 172
v. Leonard 95, 120, 411, 414
v. Litton 224, 443, 447, 503
v. McFarland's Ex. 444
v. Marsh 173
v. Tapscott 55, 276, 282, 287, 510, 569
v. Turner 10
v. Vidler 447, 503
v. Wilkinson 572
Browne *v.* Carr 476
v. Gibbins 113, 295
Brownel *v.* Brownel 517
Brownlee *v.* Allen 144, 366
Brownrigg *v.* Rae 164
Brozee *v.* Poyntz 66
Brubaker *v.* Robinson 283
Bruen *v.* Marquand 182, 325
Brundred *v.* Muzzy 146
Brutton *v.* Burton 179, 181, 183
Bry *v.* Cook 517
Bryant *v.* Wardell 48
Bryden *v.* Taylor 147
Brydges *v.* Branfill 150, 151
Bryson *v.* Whitehead 410
Buchan *v.* Sumner 364, 371, 372, 377, 378
Buchanan *v.* Curry 176, 177, 178
Buchoz *v.* Grandjean 176
Buck *v.* Mosley 209, 293
v. Winn 372
Buckingham *v.* Burgess 120
v. Hanna 159
Buckland *v.* Newsame 175
Buckley, *Ex parte* 128, 214
v. Bramhall 538
v. Buckley 364, 366, 371, 372
Bucknal *v.* Roiston 168
Bucknam *v.* Barnum 42, 85, 194
Buckner *v.* Lee 42, 81, 129, 130
Buddington *v.* Stewart 548, 559
Buell *v.* Cole 270
Buffalo City Bank *v.* Howard 411
Buffum *v.* Buffum 7, 364
Buford *v.* Neely 400
Bulfinch *v.* Winchenbach 56, 360
Bulkley *v.* Barber 548
v. Dayton 182
v. Marks 532, 537, 538
Bull *v.* Schuberth 59
Bullen *v.* Sharp 67, 74, 160
Bullock *v.* Boyd 516
Bullpin *v.* Clarke 25
Bumage *v.* Prosser 338
Bumpass *v.* Webb 271
Bunn *v.* Guy 410
Burch *v.* Breckinridge 25
Burckle *v.* Echart 42, 85
Burden *v.* Burden 230, 231, 394, 442, 443, 451

Burdick *v.* Green 486
Burdon *v.* Dean 483
Burfield *v.* Loughborough 230
Burgan *v.* Lyell 413
Burgess *v.* Atkins 352
v. Lane 195
v. Merrill 23
Burgne *v.* Firmin 194
Burk *v.* McClain 475
Burke *v.* Winkle 24
Burleigh *v.* Parton 204, 210
v. Stott 186
Burley *v.* Harris 288, 290, 326
Burmester *v.* Norris 99
Burn, *Ex parte* 493, 496
v. Burn 180
v. Morris 331, 334
Burnell *v.* Hunt 7, 48
v. Minott 273, 283, 286, 287
Burnes *v.* Pennell 546
Burnham *v.* Whittier 200, 329
Burnhisel *v.* Firman 230
Burns *v.* Harris 494
v. Nollingham 279
v. Rowlands 66
Burnside *v.* Merrick 364, 368, 372, 374, 441
Burrell, *Ex parte* 500, 502
Burton, *Ex parte* 412, 497
v. Goodspeed 67
v. Issitt 174, 392
v. Wookey 226, 227, 305, 306
Burtus *v.* Tisdall 346, 347, 353
Burwell *v.* Mandeville 438, 450, 454
Busby *v.* Chenault 449
Bush *v.* Crawford 201
v. Stowell 195
Bushell, *Ex parte* 122
Butchart *v.* Dresser 314, 315, 386, 387, 388, 392, 393, 440
Butcher *v.* Forman 272, 477, 562
Butler *v.* Burleson 445
v. Stocking 216
Butlin, *Ex parte* 491
Butterfield *v.* Hartshorn 485
v. Hensley 95
Button *v.* Hampson 179
Butts *v.* Dean 486, 567
Buxton *v.* Lister 13, 235, 236
v. Snee 564, 569
Byers *v.* Dobie 475
v. Van Deusen 468
Byrd *v.* Fox 133, 237, 283

C.

Cabell *v.* Vaughan 333, 337
Cadwallader *v.* Blair 434
v. Kroesen 176, 210
Cady *v.* Shepherd 178, 181, 189, 192
Calder *v.* Rutherford 447
Calder & Hebble Nav. Co. *v.* Pilling 543
Caldicott *v.* Griffiths 43, 297
Caldwell *v.* Gregory 474, 497
v. Lawrence 190
v. Leiber 38, 227, 229, 230, 243, 244, 394, 522
v. Sigourney 188
v. Sithens 126
v. Stileman 390
Calkins *v.* Smith 201, 210
Callumb *v.* Read 364, 371
Calvert *v.* Marlow 278
Calvin *v.* Markham 288
Calvit *v.* Markham 516
Camblat *v.* Tupery 299, 512
Cambridge *v.* Hobart 188
Cammack *v.* Johnson 310, 349, 360, 448, 501
Camp *v.* Grant 349
Campanari *v.* Woodburn 397
Campbell *v.* Bowen 218
v. Dent 67
v. Hastings 12, 469
v. Mathews 173
v. Mullett 257, 325, 345, 346, 351, 442, 474, 493, 503, 504
v. Stein 570
v. Stewart 102
v. Thompson 550
Candler *v.* Candler 17, 56, 264
Canfield *v.* Hard 37, 438, 450
Cann *v.* Cann 513
Cannan *v.* Bryce 10
v. Meaburn 572
Cannon *v.* Alsbury 21
Capen *v.* Alden 433
v. Barrows 275, 276, 279
Cape Sable Co.'s Case 381, 385, 464
Card *v.* Hope 559
Carden *v.* General Cemetery Co. 545
Carey *v.* Carver 112, 113
Cargill *v.* Corby 96, 100
Carlen *v.* Drury 286, 459, 541, 545
Carlisle *v.* Mulhern 374, 376
Carlton *v.* Ludlow Woollen Mill 190
Carmichael *v.* Greer 469
Carpenter, *Ex parte* 492
v. Lockhart 252
Carr *v.* Smith 282
Carrick *v.* Vickery 526
Carrington *v.* Cantillon 174
Carroll *v.* Blencow 23
Carter, *Ex parte* 479, 502
v. Horne 225
v. Southall 196
v. Whalley 120, 131, 411, 416
Carver *v.* Dows 112
v. Miller 554
Carvick *v.* Vickery 39, 148, 199
Cary *v.* Williams 322
Casco, The Brig 572
Case *v.* Abeel 441, 442
v. Maxey 274

Casey *v.* Brush 280, 512
Cash *v.* Tozer 179
Castell, *Ex parte* 480, 502
Castelli *v.* Cook 558
Castle, *Ex parte* 496
Caswell *v.* Cooper 272, 273
v. Cross 572
Catskill Bank *v.* Gray 29, 80
v. Messenger 173
v. Stall 212, 216
Catt *v.* Howard 196, 435
Caudell *v.* Shaw 23
Causten *v.* Burke 273
Cavitt *v.* James 391
Cayton *v.* Hardy 16
Chadsey *v.* Harrison 280, 282
Chadwick *v.* Clarke 289, 545
Chalmers *v.* Bradley 515
Chamberlain *v.* Dow 397
v Madden 65
v. Walker 271
Chambers *v.* Clearwater 152
v. Goldwin 516, 517
v. Howell 442
v. Walker 272
Champion *v.* Bostwick 55, 80, 92
v. Mumford 200
v. Rigby 515
Champlin *v.* Butler 571
v. Tilley 195
Chandler, *Ex parte* 482, 483
v. Brainard 148
v. Herrick 173
v. Parkes 22
Channel *v.* Fassit 11, 160
Channell *v.* Ditchburn 186
Chapin *v.* Coleman 195
Chapline *v.* Conant 67
Chapman *v.* Beach 458, 459, 512
v. Durant 554, 565, 566, 567
v. Koops 270, 309, 343, 352, 480
v. Thomas 386
v. Wilson 7, 132
Chappedelaine *v.* Dechenaux 513, 516
Chappel *v.* Brockway 410
Chapple *v.* Cadell 249, 512
Chardon *v.* Oliphant 193
Charlton *v.* Poulter 304, 305, 311
Charman *v.* Henshaw 130
Charrington *v.* Laing 252
Chase *v.* Barrett 48, 60, 144
v. Garvin 283, 284
v. Stevens 148
Chavany *v.* Van Sommer 237, 304, 311, 381, 400, 402
Chazournes *v.* Edwards 112, 113, 202, 203, 204
Cheap *v.* Cramond 36, 51, 56, 76, 89, 145, 172, 196
Cheddick *v.* Marsh 252
Cheeny *v.* Clark 43, 100, 271
Cheeseman *v.* Sturges 163
Cheever *v.* Smith 566, 567
Chenowith *v.* Chamberlin 216
Cheshire *v.* Barrett 19
Chesley *v.* Thompson 556
Chesson *v.* Chesson 514
Chester *v.* Dickenson 7, 152, 349
Chevalier, *Ex parte* 491, 499
Chidsey *v.* Porter 132
Child *v.* Hudson's Bay Co. 543
Chilton *v.* London & Croydon R. Co. 543
Chippendale *v.* Thurston 187
v. Tomlinson 445
Chissam *v.* Dewes 263
Chitty *v.* Naish 427
Christian *v.* Ellis 510
v. Senhouse 317
Christie, *Ex parte* 214
v. Bishop 195
v. Craig 558
Chuck, *Ex parte* 31, 56, 139, 142, 496
Church *v.* Knox 167, 310, 343, 350, 360, 449, 481
v. Sparrow 63, 105, 172
Churchman *v.* Smith 42, 81
Churton *v.* Douglass 409
Citizens Ins. Co. *v.* Wallise 483
City Bank of Brooklyn *v.* Dearborn 415
v. McChesney 415, 418
City of Maynoketa *v.* Willey 346
Clagett *v.* Hall 517
Clagget *v.* Kilbourne 37
Clairborne *v.* Creditors 458, 467
Clancarty *v.* Latouche 520
Clapp *v.* Rogers 412, 413, 415
Clark, *In re* 17
v. Clement 173
v. Dibble 278, 283
v. Flint 235
v. Hooper 187
v. Houghton 97
v. House 447
v. Howe 330
v. Huffaker 194
v. Leach 234
v. Miller 292
v. Reid 148
v. Sigourney 188
v. Van Reimsdyk 195
v. Wilson 167
Clarke, *Ex parte* 491
v. Imperial Gas Co. 546
v. Richards 37, 258
v. Tipping 516
Clarkson, *Ex parte* 497
v. Carter 292, 501
Clay, *Ex parte* 348, 482, 493
v. Cotrell 104, 112, 203
v. Langslow 195
v. Rufford 340
Clayton's Case 155, 428, 432, 433, 523, 524

Clegg *v.* Fishwick 319, 393
v. Houston 494
Cleghorn *v.* Ins. Bank of Columbus 345
Clement *v.* Brush 107, 108, 178, 180
v. Foster 512
v. Hadlock 85
Clements *v.* Hall 393
Clementson *v.* Blessing 27
v. Williams 190
Clerk *v.* Blackstock 139
Cleveland *v.* Woodward 291
Clifford *v.* Brooke 296
Clowes, *Ex parte* 148, 435
v. Hawley 324
Coates *v.* Coates 244, 306
v. Williams 57, 146
Coats *v.* Holbrook 265
Cobb *v.* Abbott 55, 156
v. Ill. Con. R. R. 198
v. New England Mut. M. Ins. Co. 177
Cobham, *Ex parte* 499
Cochran *v.* Perry 12, 162, 400, 462
Cockburn *v.* Thompson 545
Cocke *v.* Bank of Tennessee 197
v. Branch Bank 100
Cockerell *v.* Aucompte 43
v. Cholmeley 515
Cocks *v.* Nash 173
Coddington *v.* Hunt 412
Coder *v.* Huling 378
Codman *v.* Rodgers 520
Coffee *v.* Brian 273, 275, 282
Coffin *v.* Jenkins 81
Cofton *v.* Horner 311
Cohen *v.* Gibbs 471
v. Hannam 336
v. N. Y. Life Ins. Co. 27
Coit *v.* Tracy 188, 189
Colbeck, *In re* 76, 136, 138
Colburn *v.* Phillips 334, 335
Colby *v.* Lamson 24
Cole *v.* Albers 493
v. Pennel 23
v. Pennoyer 18
v. Reynolds 325
v. Sackett 110, 486
v. Terry 323
Coleman *v.* Coleman 273
Coles *v.* Coles 163, 363
v. Gurney 174
Collamer *v.* Foster 271, 273
Collier *v.* Leech 107, 108
Collins *v.* Prosser 173
v. Warren 372, 373
v. Young 319
Collyer *v.* Collyer 508
Colnaghie *v.* Block 387, 399
Colt *v.* Wollaston 296, 458
Colwell *v.* Lawrence 475
Commercial Bank *v.* Warren 203
Commercial Bank *v.* Wilkins 167, 338, 343, 345, 353, 360, 503
Commercial Bank of Manchester *v.* Lewis 199, 212
Com. *v.* Bennett 67
Compton *v.* Greer 516
Comstock *v.* Smith 486, 567
Conant *v.* Frary 375
Condry *v.* Gilliam 307
Conery *v.* Hayes 194
Conklin *v.* Barton 86, 92
Conkling *v.* Washington University 142
Connecticut River Bank *v.* French 201
Connelly *v.* Cheevers 447
Conro *v.* Port Henry Iron Co. 412, 414
Consequa *v.* Fanning 516
Const *v.* Harris 219, 222, 238, 313, 314, 315, 519
Contee *v.* Dawson 248, 517
Converse *v.* Shambaugh 12
Conwell *v.* Sundidge 167, 261, 345, 400, 446, 503, 525, 552
Cook, *Ex parte* 473, 480, 483, 493, 502
v. Batchellor 337, 338
v. Beech 330, 337
v. Carpenter 7
v. Castner 196
v. Collingridge 443, 446, 473, 507, 511, 515, 524, 525
v. Fowler 230
v. Jenkins 389
Cooke, *Ex parte* 347
v. Seeley 106, 329, 334
Cookingham *v.* Lasher 290, 350
Cookson *v.* Cookson 370, 473, 511
Coombs *v.* Boswell 396
Coomer *v.* Broomley 150
Coons *v.* Renick 175
Coope *v.* Bowles 164
v. Eyre 36, 41, 45, 47, 62, 105, 526
Cooper, *Ex parte* 497
v. Henderson 471
v. McClarkan 212
v. Watlington 244
v. Watson 410
Cope's Appeal 481
Copeland, *Ex parte* 165
Coppard *v.* Page 77
Corbett *v.* Poelnitz 23
Corbin *v.* McChesney 112
Cork & Bandon R. R. Co. *v.* Cazenove 21
Cornwall *v.* Hoyt 24
Corpe *v.* Overton 18
Corps *v.* Robinson 194, 196
Corwin *v.* Suydam 103
Cosio *v.* DeBernales 23, 26, 328
Coslake *v.* Till 263, 445
Costeker *v.* Horrox 518
Coster *v.* Clarke 363, 364, 372, 373
Cothay *v.* Fennell 291, 334, 335, 501

Cotter *v.* Bettner 55, 156
Cottle *v.* Leitch 458
Cotton *v.* Evans 112, 113, 203
Cottrill *v.* Vanduzen 66, 132
Couch *v.* Mills 173
Cough *v.* Radcliffe 458, 467
County *v.* Gates 179
Courcey *v.* Baker 200, 217
Course *v.* Prince 280, 282
Coursen *v.* Hamlin 229
Court *v.* Cross 186
Cowan *v.* Burgess 323
Cowell *v.* Edwards 569
v. Sikes 348, 485
Cowles *v.* Garrett 159, 160, 323
Cox, *Ex parte* 174
v. Bodfish 545
v. Delano 82, 144
v. Hickman 74, 86, 146
v. McBurney 364
v. Reid 553, 566
Crabtree *v.* May 18, 21
Caddeck *v.* Simpson 7
Cragin *v.* Carleton 195
Craig *v.* Alverson 193
v. Hulschezer 293
Cramer *v.* Noonan 339
Crane *v.* Ford 315
v. French 179, 359
Crapster *v.* Griffith 558
Crater *v.* Binninger 271
Craven *v.* Knight 502
v. Widdows 232
Crawford *v.* Austin 67
v. Baum 481
v. Collins 125, 254
v. Hamilton 407
v. Stirling 217
Crawshay *v.* Collins 223, 224, 232, 234, 239, 241, 263, 388, 401, 406, 440, 443, 444, 445, 469, 472, 474, 503, 505, 509, 511, 524, 525
v. Maule 36, 159, 236, 237, 314, 317, 319, 381, 382, 388, 393, 399, 401, 404, 407, 438, 440, 446, 452, 464, 469, 507, 524, 525
Creath *v.* Sims 424
Creel *v.* Bell 334, 335
Cremer *v.* Higginson 427
Crisdee *v.* Bolton 251
Crisp, *Ex parte* 483
Crispe *v.* Perritt 461, 470
Crocker *v.* Colwell 201
v. Higgins 475
Crockett *v.* Crain 349
Croft *v.* Pyke 168, 349, 481
Crompton *v.* Conkling 475
Cromwell *v.* County of Sac 230
Cronise *v.* Clark 18
Crooker *v.* Crooker 481, 485
Crosbie *v.* Guion 438
Cross *v.* Cheshire 273, 275, 277, 281, 282, 510
v. Jackson 276
v. Langley 12
Crosthwait *v.* Ross 100
Crottes *v.* Frigerio 268
Crouch *v.* Bowman 126, 215
Croughton *v.* Forrest 164
Crowder, *Ex parte* 347
Crowe *v.* Clay 486
Croxton, *Ex parte* 234
Crozier *v.* Kirker 127, 199
Crumless *v.* Sturgess 194
Crusader, The 81
Cruttwell *v.* Brown 182
v. Lye 262, 444
Cullen *v.* Duke of Queensbury 545
Cullum *v.* Bloodgood 166
Cumming *v.* Forester 335
v. Hackley 287
v. Parish 95
v. Powell 18
Cummins *v.* Cassily 178, 179, 183
v. Cummins 395
Cumpston *v.* McNair 39, 51, 55
Cunliffe *v.* Dyerville 230
Cunningham *v.* Bragg 390
v. Littlefield 173, 510
v. Munroe 437
Curling *v.* Robertson 554
Currier *v.* Cameron 103, 202
v. Silloway 31
v. Webster 271
Curry *v.* Larer 252
Curtis *v.* Belknap 292, 334, 335
v. Hubbard 567
v. Perry 497, 499, 556
Cushing *v.* Marston 329, 330
v. Smith 116
Cushman *v.* Bailey 81
Cust, *Ex parte* 492, 500
Cutbush *v.* Cutbush 454
Cutler *v.* Thomas 7
v. Winsor 82, 85, 144
Cutts *v.* Gordon 23
Cuxon *v.* Chadley 485

D.

Dabney *v.* Stidger 197
Dacie *v.* John 321, 522
Dailey *v.* Hall 44
Dain *v.* Cowing 323
Dakin *v.* Demming 514
v. Graves 284
v. Williams 251
Dale *v.* Hamilton 8, 37, 363
Dalton *v.* Dalton 44
v. Hawes, 44
v. Murphy 25
Dana *v.* Lull 163, 165, 166
v. Stearns 21

Dance *v.* Girdler 333
Danforth *v.* Carter 194
Daniel *v.* Cross 149, 426
v. Daniel 176, 209, 293, 295, 350
v. Townsend 349
Dann *v.* Spurrier 494
Darby *v.* Baines 558
v. Darby 363, 368, 370, 371
Darling *v.* March 112, 192, 197, 203, 216, 387, 390
Darracott *v.* Pennington 47
Darst *v.* Roth 180, 181
Dart *v.* Walker 152
Darthery *v.* Lee 516
Davenport *v.* Gear 280, 283
v. Rackstrow 135, 292
v. Runlett 112, 113, 202
David *v.* Ellice 110, 397, 422, 485, 487
Davidson *v.* Bridgeport 486
v. Robertson 200
Davies *v.* Edwards 194
v. Hawkins 276, 291, 545
v. Penton 252
v. Spurling 517
Davis *v.* Allen 413
v. Briggs 289, 326
v. Brig Seneca 559, 561
v. Burton 181
v. Christian 364, 367, 368, 372, 373, 376
v. Church 447
v. Coleman 188
v. Davis 338
v. Johnston 554, 559, 561, 562
v. Keyes 397, 411, 413,
v. Mason 410
Davis & Desauque, Estate of 111, 390
Dawes *v.* Head 475
Dawham *v.* Rogers 85
Day *v.* Boswell 41
v. Lafferty 180
v. Lockwood 229
v. McQuillam 474
Deal *v.* Bogue 337, 339, 343, 358, 359
Dean *v.* McGhie 571
v. Newhall 333
v. Richmond 24
Dear, *Ex parte* 448
De Berenger *v.* Hammell 459
De Berkom *v.* Smith 39, 66, 99, 131, 132, 195, 495
Deckard *v.* Case 164, 166, 183
Decker *v.* Howell 44
Decreet *v.* Burt 289
Deering *v.* Flanders 413
Deerly *v.* Mazarine 24
Deford *v.* Reynolds 412, 413, 414, 416, 418
De Gaillon *v.* Darby 330, 337
v. L'Aigle 24
De Jarnette *v.* McQueen 215, 272, 285, 287
Deland *v.* Amesbury Man. Co. 423
Delancy *v.* Timberlake 44
Delano *v.* Blake 19
Delauney *v.* Strickland 37, 43
Del Col *v.* Arnold 572
De Lizardi *v.* Gossett 538
Delmonico *v* Guillaume 343, 364
Deloney *v.* Hutcheson 364, 372, 374
De Mautort *v.* Saunders 290, 291
De Mazar *v.* Pybus 37
Deming *v.* Colt 165, 166
De Montmorency *v.* Devereux 516
Demoss *v.* Brewster 174
Demott *v.* Swaim 193
Denman *v.* Dosson 411, 413
Dennett *v.* Chick 65
Dennis *v.* Green 353
Denny *v.* Cabot 83, 84, 87, 90, 92, 96
v. Metcalf 288
Denton *v.* Richmond 251
v. Rodie 105, 213
De Pusey *v.* Du Pont 247
Descadillas *v.* Harris 486, 567
Desha *v.* Holland 334
v. Smith 229, 230
Desideri, *In re* 469
Despatch Line of Packets *v.* Bellamy Manuf. Co. 108
De Tastet, *Ex parte* 483, 489
v. Bordenave 305, 322
v. Carroll 172, 477
v. Shaw 269, 289, 290, 326
Devall *v.* Burbridge 224
Devaynes *v.* Noble 348, 397, 426, 428, 432, 433, 448, 485, 523
Deveau *v.* Fowler 306
Devin *v.* Harris 233
De Wahl *v.* Braune 28
Dewdney, *Ex parte* 483
Dewey *v.* Dewey 372
De Wolf *v.* Gardiner 548
Dexter *v.* Arnold 514
De Zeng *v.* Bailey 173
Dickenson *v.* Lockyer 395, 427
v. Lord Holland 515
Dickinson *v.* Bold 240, 446
v. Dickinson 194, 397, 506
v. Granger 280, 281, 285, 523
v. Legare 166, 510
v. Valpy 14, 99, 119
Dickson, *Ex parte* 489
v. Alexander 164, 175
v. Indiana Mfg. Co. 395
Die Fire Damer 572
Dietrichsen *v.* Cabburn 298
Digby, *Ex parte* 76
Dilk *v.* Heighley 18
Dillon *v.* Brown 376
Dilworth *v.* Mayfield 363, 368, 376
Dimon *v.* Hazard 409
Dinham *v.* Bradford 230
Dinsmore *v.* Dinsmore 188, 189
Dios *v.* Owners of the Revenge 572

Ditchburn *v.* Sprachlin 194, 475
Ditts *v.* Lonsdale 201
Divine *v.* Mitcham 372
Dix *v.* Mercantile Ins. Co. 336
v. Otis 14, 56
Dixon *v.* Cooper 77, 145
Doak *v.* Swann 55
Doane *v.* Adams 48
Dob *v.* Halsey 56, 81, 112, 113, 204, 209, 329
Dobbin *v.* Foster 331, 398
v. Hubbard 25
Docker *v.* Somes 155
Doddington *v.* Hallett 344, 548, 550, 551, 552, 554, 563, 564
Dodgson, *Ex parte* 160
v. Bell 26, 162
Doe *v.* Chippenden 290
Doe *dem.* Elliott *v.* Hulme 197
Doggett *v.* Jordan 7
Dolman *v.* Orchard 66, 119, 132, 411, 414
Dommet *v.* Bedford 473
Domville *v.* Solly 518
Donaldson *v.* Kendall 510
v. Williams 228
Donelson *v.* Posey 261
Doner *v.* Stauffer 167, 343, 345, 449, 503
Doniphan *v.* Gill 108
Donnally *v.* Ryan 105
Dore *v.* Wilkinson 156
Doremus *v.* McCormick 150, 173, 325
v. Selden 272, 334
Doty *v.* Bates 127, 202, 214
Dougall *v.* Cowles 163, 200
Dougherty *v.* Van Nostrand 226, 229, 262, 263, 264, 394, 444, 446, 525
Douglas *v.* Horsfall 340
v. Russell 555
v. Winslow 343, 352
Dounce *v.* Parsons 155
Dow *v.* Phillips 201
v. Sayward 96, 102, 310, 352
Dowley *v.* Hall 44
Downham *v.* Matthews 237
Downing *v.* Linville 210
Downs *v.* Collins 159, 450, 454
v. Gazebrooke 515
v. Jackson 287, 386
Dowzelot *v.* Rawlings 195
Doyle *v.* Bailey 510
Drake *v.* Elwyn 7, 125, 200
v. Ranney 60, 142
v. Rogers 167
Dran *v.* Newhall 173
Drennen *v.* House 116
Drew *v.* Ferson 228
v. Power 516
Drewry *v.* Montgomery 365
Driver *v.* Burton 330
Druid, The 572
Drumright *v.* Philpot 181
Drury *v.* Roberts 314
Dry *v.* Boswell 48, 76, 88, 89, 91
v. Davy 332
Dublin & Wicklow R. R. Co. *v.* Black 21
Dubois *v.* Ludert 290
v. Roosevelt 526
Dubois's Appeal 163, 184
Duckworth *v.* Allison 251
v. Strafford 316
Dudley *v.* Littlefield 37, 363
Duff *v.* East India Co. 173, 396
v. McGuire 44
Duggins *v.* Watson 572
Duhring *v.* Duhring 364, 371, 373, 374, 376
Dulles *v.* De Forest 432
Dumas *v.* Jones 336
Dumont *v.* Ruepprecht 437
Dunbar *v.* Lane 516
Duncan *v.* Clark 212
v. Lewis 103
v. Lowndes 217
v. Lyon 271, 275, 285, 510
v. Worrall 308
Dundass *v.* Gallagher 216
Dundee, The 572
Dunham *v.* Dodge 190
v. Gillis 275
v. Hanna 481
v. Jarvis 317
v. Rogers 117
Dunlop *v.* Gregory 410
Dunn *v.* Slee 287
Dunning's Appeal 535
Dupuy *v.* Johnson 287
v. Leavenworth 364
Durbin *v.* Barber 459
Duryea *v.* Burt 67
Duryee *v.* Elkins 81
Dusar *v.* Murgatroyd 512
Dutton *v.* Morrison 3, 180, 309, 461, 469, 471, 474, 476, 481, 506
v. Woodman 124, 194
Duvergier *v.* Fellows 542, 545, 547
Dwight *v.* Brewster 156, 172
Dwinel *v.* Stone 7, 49, 56
Dyer *v.* Clark 167, 363, 364, 365, 366, 368, 371, 372, 373, 374, 378, 438, 440, 441, 497, 523
Dyke *v.* Brewer 14, 62, 163, 434
Dyster, *Ex parte* 496

E.

Eagle *v.* Bucher 401
Earl of Chesterfield *v.* Janssen 516
Earl Pomfret *v.* Lord Windsor 517
Early *v.* Reed 216
Eason *v.* Cherry 224
Eastburn *v.* Kirk 311
East India Co. *v.* Blake 251
v. Vincent 494

Eastman *v.* Cooper 175
v. Foster 489
v. Wright 175, 288, 325, 329
Eastwood *v.* Brown 496
Eaton *v.* Boissoncault 230
Ebbert's Appeal 7, 371
Eccleston *v.* Clipsham 233, 243, 275, 276
Eddie *v.* Davidson 167, 449, 480
Edgar *v.* Donally 378
v. Fowler 287
v. Knapp 273, 287
Edgerly *v.* Shaw 19
Edmiston *v.* Wright 175
Edmonson *v.* Davis 157
Edmund *v.* Caldwell 335
Edmundson *v.* Thompson 116
Edwards *v.* McFall 416
v. Meyrick 515
v. Tracy 44
Egberts *v.* Wood 166, 167, 345, 442, 470, 474
Egyptienne, The 560
Ehle *v.* Purdy 333
Einer *v.* Deynoodt 166
Elder *v.* Hood 273
Elderkin *v.* Winne 52
Eldredge *v.* Frost 44
Electric Telegraph Co. of Ireland, *In re* 381
Elgie *v.* Webster 7, 142, 271, 510
Elizabeth & Jane, The 560
Ellicott *v.* Nichols 190
Elliot *v.* Brown 307, 387, 441
v. Davis 180
Elliott *v.* Dudley 112, 203
v. Sleeper 486
v. Stevens 354
Ellis, *Ex parte* 479, 502
v. Bronson 411, 416
v. Jameson 195
v. Watson 195
Ellison *v.* Chapman 275
v. Dezell 182
v. Moffat 514
Ellston *v.* Deacon 112
Ellsworth *v.* Tartt 55
Elton, *Ex parte* 348, 481, 482, 493
Emanuel *v.* Bird 349, 449
v. Draughn 42, 55
Emerson *v.* Harmon 172, 175, 212
v. Knower 182, 325
Emly *v.* Lye 105, 213
Emmet *v.* Butler 414
Enderby, *Ex parte* 496, 497
England *v.* Curling 223, 235, 236, 238, 459
Englis *v.* Furniss 288, 290, 325
Ennis *v.* Williams 411
Ensign *v.* Wands 39, 99, 526
Ensminger *v.* Marvin 202
Essex *v.* Essex 370, 371
Estabrook *v.* Messersmith 462
Estabrook *v.* Smith 328, 329
Estes *v.* Whipple 276, 289
Estwick *v.* Conningsby 314, 319, 321, 442
Etheridge *v.* Binney 63, 129, 130, 172, 201, 202
Etnyre *v.* McDaniel 230
Eubanks *v.* Peak 19
Evans *v.* Bennett 333
v. Bicknell 296, 513
v. Biddleman 104
v. Corriell 195
v. Drummond 62, 111, 195, 397, 415, 423, 485, 488
v. Evans 319, 440, 442, 446, 507, 525
v. Gibson 366, 374
v. Silverlock 294, 330
v. Wells 212
v. Yeatherd 273, 286
Everard *v.* Herne 173
Everett *v.* Coe 81, 89
v. Stone 476
Everit *v.* Strong 166, 183
v. Watts 25
Everitt *v.* Chapman 7, 44, 63, 118, 256
Evernghin *v.* Ensworth 112, 210
Ewing *v.* French 334
v. Osbaldistone 10
Exeter Bank *v.* Sullivan 185, 190
Experiment, The 559

F.

Fagely *v.* Bellas 184
Faikney *v.* Reynous 9
Fail *v.* McRee 46
Fairburn *v.* Pearson 313
Fairchild *v.* Fairchild 364
v. Holley 428, 430, 432
Fairlie, *Ex parte* 148, 149
Fairthorne *v.* Weston 313, 459, 512
Faith *v.* Richmond 126, 127
Faldo *v.* Griffin 414
Falkland *v.* Cheney 218
Fall River Whaling Co. *v.* Borden 8, 37, 363, 364, 365, 369
Fanning *v.* Chadwick 278, 279, 281, 285
Fanshawe *v.* Lane 535
Farina *v.* Silverlock 265
Farlow, *Ex parte* 474
Farmer *v.* Bissell 287
v. Davies 553
Farmer's Bank of Mo. *v.* Bayless 213
v. Clark 188
v. Green 418
Farmer's Ins. Co. *v.* Ross 44
Farnham *v.* Brooks 515
Farnum *v.* Boutelle 432
Farr *v.* Johnson 258

Farr *v.* Pearce 264, 265, 409, 444, 445
v. Smith 323, 555, 556
Farrant *v.* Olmius 251
Farrar *v.* Beswick 261, 323, 552, 555, 556
v. Deflinne 416
v. Hutchinson 112, 175, 210, 211
Farrer *v.* Granard 24
Fawcett *v.* Osborne 86
v. Whitehouse 225
Fay *v.* Davidson 44
v. Noble 43
Fearns *v.* Young 447, 503
Featherstone *v.* Hunt 397, 425
Featherstonhaugh *v.* Fenwick 226, 240, 263, 382, 383, 394, 399, 401, 446, 473, 507, 511, 524, 526
Feigley *v.* Sponeberger 97
Felichy *v.* Hamilton 42, 46
Fell, *Ex parte* 345, 346, 351, 493, 496, 497
Fellows *v.* Wyman 388, 391, 392
Fenn *v.* Craig 340
v. Harrison 217
v. Simpson 195
Fennings *v.* Grenville 323, 556
Fenton *v.* Holloway 29
Fereday *v.* Hordern 42, 139, 142
v. Wightwick 36, 374, 446, 505, 506, 507, 525
Fereira *v.* Sayres 392
Ferguson *v.* Bell 18
Ferry *v.* Henry 521
Fichthorn *v.* Boyer 180
Fickett *v.* Swift 196
Fidgeon *v.* Sharp 476, 493
Field *v.* Carr 432
v. Clark 449
v. Crawford and Trs. 360
v. Holland 195
v. Sowle 25
Fielden *v.* Lahens 201, 204
Fife, *Ex parte* 175
Figes, *Ex parte* 506
v. Cutler 13, 237
Figgins *v.* Ward 196
Fightmaster *v.* Beasly 323
Filley *v.* Phelps 126, 215
Finckle *v.* Stacy 47
Finlay *v.* Stewart 274, 284
Finney *v.* Bedford Com. Ins. Co. 335
v. Warren Ins. Co. 336
First Nat. Bank *v.* Almy 42
Fisher *v.* Bowles 66
v. Mowbray 18
v. Murray 166
v. Tayler 176
v. Tucker 178, 188, 189, 190, 192, 510
v. Willing 571
Fisk *v.* Copeland 196
v. Herrick 167, 353, 359, 360, 449
Fiske *v.* Foster 474
Fitch *v.* Hall 85
v. Harrington 480
v. Stamps 196
v. Sutton 567
Flagg *v.* Upham 203
Flanagin *v.* Champion 193, 194
Fleming *v.* Dunbar 178, 180, 181
v. M'Nair 122
Flemyng *v.* Hector 37, 42
Fletcher *v.* Dyche 251
v. Pollard 522
Flood *v.* Yandes 180
Flower *v.* O'Conner 447
Floyd *v.* Wallace 155
Fogg *v.* Greene 195
v. Johnston 13, 296, 458, 459
Foil *v.* McArthur 196
Foley *v.* Robards 104
Folk *v.* Wilson 105, 210
Fonda *v.* Van Horne 18
Foot *v.* Sabin 112, 216
Forbes *v.* Marshall 128
v. Webster 287
Ford *v.* Haft 179
v. Phillips 19
Forde *v.* Herron 364, 377, 378
Forkner *v.* Stuart 163
Forman *v.* Homfray 299, 511, 512
Forrester *v.* Bell 543
Forster *v.* Hale 322
Forsyth *v.* Hastings 19
Fortitude, The Ship 568
Fortune *v.* Brazier 271, 276, 334
Foster *v.* Allanson 280, 285, 510, 520
v. Andrews 200, 203
v. Barnes 372
v. Donald 241, 518
v. Hall 104, 105
v. Jackson 173
v. Lawson 337, 338, 339
v. U. S. Ins. Co. 175, 570
Foster's Appeal 371
Foute *v.* Bacon 190
Fowke *v.* Bowie 427
Fowle *v.* Harrington 391
Fowler *v.* Bailey 364
v. Ludwig 111, 486, 567
Fox *v.* Clifton 7, 12, 14, 31, 131, 133, 161, 170, 271, 546, 547
v. Hanbury 2, 160, 163, 165, 167, 324, 343, 461, 469, 470, 472, 473, 476, 480, 525
v. Norton 180
v. The Lodemia 559
Frances, The 556
Francis *v.* Smith 434
Francis, W. W. *In re* 67
Francisco *v.* Fitch 269
Frank *v.* Branch 365
Frankland *v.* M'Gusty 112, 113, 205, 207
Franklin, The 27

Franklin *v.* Brownlow 474
v. Hosier 569
v. Robinson 229, 394
v. Thomas 309
Franklin Bank *v.* Hooper 427
Franks, *Ex parte* 23
v. De Pienne 24
Frazer *v.* Marsh 552, 569
Frederic, The 77
Freeland *v.* Cocke 516
v. Heron 520
v. Stansfield 318, 472
Freeman, *Ex parte* 149, 435, 493, 502
v. Bloomfield 58
v. Carhart 180
v. Carpenter 208
v. Fairlie 155
v. Orzer 24
v. Ross 212
v. Smith 13
v. Stewart 503
Freeman's Bank *v.* Rollins 424
Freligh *v.* Miller 53
French *v.* Backhouse 570
v. Chase 360, 449, 501
v. Fenn 503
v. Price 60, 144, 548, 551, 567
v. Rowe 193
v. Styring 55, 271
Frentress *v.* Marble 110
Fridge *v.* The State 18
Friese *v.* Ideson 44
Frigerio *v.* Crottes 524
Frink *v.* Ryan 248, 280, 284
Frisbie *v.* Larned 111, 486
Fromme *v.* Fromme 163
Fromont *v.* Coupland 55, 280, 520
Frost *v.* Moulton 383
v. Oliver 552, 569
Fry, *Ex parte* 149, 435, 493
v. Bennett 339
Fullagar *v.* Clark 515
Fulton *v.* Williams 289
Furber *v.* Carter 66
Furlong *v.* Bartlett 324
Furnival *v.* Weston 174, 175, 325

G.

Gabriel *v.* Evill 7
Gage *v.* Rollins 329
Gainsborough *v.* Stork 233, 242, 513
Galbraith *v.* Gedge 372, 373
v. Moore 273
Gale *v.* Leckie 237, 271
v. Miller 103, 194
v. Reed 410
Gallatin *v.* The Pilot 554
Galsworthy *v.* Strutt 251, 252
Galt *v.* Calland 110, 510
Galway *v.* Matthew 97, 126, 149, 214, 397, 411
v. Smith 128
v. Smithson 98
Gamble *v.* Grimes 207
Gano *v.* Samuel 216, 233
Gansevoort *v.* Williams 112, 113, 203, 204, 216
Ganson *v.* Lathrop 214, 349
Gardiner *v.* Childs 14, 113
v. Smith 11
Gardner *v.* Cleveland 550, 551, 553, 563
v. M'Mahon 190
Gardom, *Ex parte* 172
Gardon *v.* Slowden 9
Garland, *Ex parte* 147, 454, 455, 505
v. Agee 192
v. Davidson 178
v. Jacomb 99
v. Noble 176, 338
Garrard *v.* Harding 542
Garretson *v.* Weaver 312, 314, 381, 459
Garrett *v.* Handley 175, 329, 334, 335
v. Miss. & Ala. R. Co. 308
v. Taylor 331
Garvin *v.* Paul 353
Gass *v.* Stinson 432
Gates *v.* Graham 180
v. Pollock 325
Gay *v.* Bowen 192
v. Johnson 23
Gaylord *v.* Imhoff 494
Geddes *v.* Wallace 59, 132, 284, 287, 519
Geery *v.* Cockroft 210
Gellar, *Ex parte* 52, 62, 165
General Smith, The 568, 569
George *v.* Clagett 291
Geortner *v.* Trustees, &c. 314, 391
Gerard *v.* Basse 178, 179
Gering, *Ex parte* 506
German Mining Co., *In re* 229, 230
Gervais *v.* Edwards 298
Getchell *v.* Foster 44
Gibbons *v.* Wilcox 77, 145, 148, 194
Gibbs *v.* Bryant 65
v. Merrill 23
v. The Two Friends 572
Gibson *v.* Lupton 46, 60, 104, 147
v. Minet 485
v. Moore 273, 283
v. Stevens 146, 337, 343, 359
v. Stone 86
v. Warden 178
Giddings *v.* Palmer 346
Giffin *v.* Ashby 187
Gilbank *v.* Stephenson 44
Gilbert *v.* Dickerson 323, 556
Gildersleeve *v.* Mahony 212
Gilfillan *v.* Henderson 17
Gill *v.* Geyer 249
v. Kuhn 58, 132, 282
v. M. & L. R. R. 44

Gillespie *v.* Hamilton 438
Gillett *v.* Hall 510
v. Thornton 234
Gilly *v.* Singleton 196
Gilmore *v.* Black 45, 159, 168, 546
v. Bussey 567
Gilpin *v.* Enderbey 42, 58, 142
v. Temple 195
Gitchell *v.* Heald 188
Given *v.* Albert 63, 148, 447
Glascock *v.* Smith 391
Glassington *v.* Thwaites 53, 224, 227, 228, 244, 249, 253, 304, 305, 313, 512
Glassop *v.* Colman 18, 135, 292
Gleason *v.* Clark 193
v. White 460
Glover *v.* Austin 337, 348, 552
v. Tuck 237, 275
Glyn *v.* Caulfield 521
Goble *v.* Howard 278
Goddard *v.* Bulow 443
v. Hodges 12, 160, 271, 545
v. Ingram 187, 188, 192
v. Lyman 328
v. Pratt 6, 30, 55, 385, 412, 416, 419
Godfrey *v.* Browning 438
v. Macauley 419
v. Turnbull 411, 419
Goesele *v.* Bimeler 38
Gold *v.* Canbarn 306, 517
Gomersall *v.* Gomersall 268
Good, *Ex parte* 44
v. Blewitt 558
Goodburn *v.* Stevens 364, 372, 373
Goode *v.* Harrison 18, 20, 123, 134
v. Linecum 175
v. McCartney 59, 209, 210, 293
Goodenow *v.* Tyler 567
Gooding *v.* Morgan 486
Goodman, *Ex parte* 483
v. Whitcomb 228, 297, 302, 304, 312, 314, 315, 451, 459, 586
v. White 100, 173
Goodnow *v.* Smith 179
Goodsell *v.* Myers 19
Goodtitle *v.* Woodward 197
Gordon *v.* Buchanan 175
v. Ellis 211, 291, 293
v. Freeman 396, 400
v. Gordon 513
v. Kennedy 345
Gorham *v.* Thompson 413, 418
Gorman *v.* Russell 541
Goss *v.* Dufresnoy 502
v. N. Y. & P. R. R. Co. 54
Gough *v.* Davies 397, 425
Gould *v.* Gould 261, 552
v. Horner 401
v. Stanton 559, 563, 569
Goulding, *Ex parte* 111, 205
v. Bain 313, 316
Goulé *v.* Hayward 55
Gouthwaite *v.* Duckworth 62, 117, 118, 256
Govett *v.* Radnidge 157
Gowan *v.* Foster 553
v. Jackson 196
v. Jeffries 314, 315, 316, 317, 320, 381, 459, 461, 469
Gowdy *v.* Gillam 190
Gower *v.* Saltmarsh 252
Grace *v.* Shurter 447
v. Smith 41, 67, 69, 73, 78, 136, 137, 138, 140, 141, 142
Graeff *v.* Hitchman 63, 105, 213
Grafton *v.* United States 65
Grafton Bank *v.* Moore 194
Graham *v.* Harris 288
v. Holt 280, 283
v. Hope 413, 419
v. Robertson 272, 273, 284, 287, 475
v. Wichels 395
Gram *v.* Cadwell 96, 112, 210
v. Seton 181, 182
Grant, *In re* 489
v. Hawkes 200, 211, 233
v. Jackson 194, 195
v. Watts 13
Grasselli *v.* Lowden 410
Gratz *v.* Bayard 159, 224, 304, 319, 439, 458
Graves *v.* Boston Marine Ins. Co. 175, 336
v. Kellenberger 201
v. Key 495
v. Merry 411, 412
v. Sawcer 323, 548, 556, 557, 562
Gray, *Ex parte* 491
v. Brown 173
v. Chriswell 348
v. Cropper 151
v. Crosby 251
v. Gibson 536, 540
v. Hodgson 194
v. Palmer 363, 368, 372
v. Portland Bank 250
v. Ward 100
v. Washington 513
v. Wilson 248
Grazebrook, *Ex parte* 479
v. M'Creedie 179
Greatrix *v.* Greatrix 305
Greeley *v.* Wyeth 112, 170, 210, 211, 293, 330
Green *v.* Barrett 13, 296, 457
v. Beals 178, 179
v. Beesley 41, 55
v. Bostwick 321
v. Bradfield 493
v. Briggs 548, 551, 563, 564
v. Chapman 288, 325
v. Deakin 111, 205

Green *v.* Greenbank 158
v. Tanner 105, 213
v. Waring 468
Greene *v.* Greene 167, 343, 366, 372, 573
Greenleaf *v.* Quincey 189, 192
Greenslade *v.* Dower 99, 176
Gregg *v.* Brower 270
v. James 173
Gregg Township *v.* Half-Moon Township 56
Gregory *v.* Paul 24
v. Bailey 292
v. Gregory 515
v. Pierce 24
Gregory's Ex'rs *v.* Forrester 514
Grellier *v.* Neale 291
Gribble, *Ex parte* 563
Gridley *v.* Dole 274, 286, 510
Grieff *v.* Boudousquie 61
Grier *v.* Hood 179
Griffin *v.* Doe 7
Griffith *v.* Buck 346, 351
v. Buffum 55, 63, 118
v. Chew 288, 325
v. Wilbing 510
Grigsby *v.* Rance 274
Grill, *Ex parte* 500
Grinau *v.* Baton Rouge Mills Co. 415, 418
Griswold *v.* Haven 190
v. Waddington 12, 27, 28, 160, 327, 438, 461, 463, 464, 469, 504, 546
Grosvenor, *Ex parte* 506
v. Lloyd 63, 416
Grove *v.* Dubois 335
Grover *v.* Hall 516
v. Hugell 308
Grozier *v.* Atwood 81
Grund *v.* Van Vlack 150
Guidon *v.* Robson 66, 132, 134, 135, 293, 334, 495
Guild *v.* Welch 103
Guillon *v.* Peterson 155, 198
Gulick *v.* Gulick 278, 280
Gunter *v.* Williams 109
Gurney, *Ex parte* 496
Guyther *v.* Pettijohn 323
Gwinn *v.* Rooker 181
Gyger's Appeal 230

H.

Habershon *v.* Blurton 358, 385, 400, 462
Hacker *v.* Shepherd 475
Hackley *v.* Patrick 189, 193
Haddock *v.* Crocheron 194
Hadfield *v.* Jameson 63, 151, 156
Hagar *v.* Mounts 112, 203
v. Stone 291
Hagedorn *v.* Oliverson 335, 557, 570
Haggart *v.* Morgan 248
Haggerty *v.* Taylor 536, 537
Hague *v.* Rolleston 160, 461, 469, 471, 483
Haldeman *v.* Bank of Middletown 202
Halderman *v.* Halderman 283
Hale *v.* Gerrish 19
v. Hale 313, 314, 459
v. Hurrie 368, 378
Halhed *v.* Marke 513
Halket, *Ex parte* 550
Hall, *Ex parte* 174, 482, 483
v. Bairdbridge 178
v. Digby 54
v. Franklin 16
v. Hall 314, 345, 403, 448, 459, 460
v. Lanning 175, 178, 194
v. Leigh 46
v. Smith 128, 149, 214
v. Stewart 275, 510
v. Wood 349
Hallack *v.* March 176
Hallett *v.* Cumston 67
v. Dowdall 543
v. Hallett 522
Halliday *v.* Doggett 329, 334, 335
v. Ward 186
Hallifax, *Ex parte* 44, 496
Halls *v.* Coe 175, 210
Halpenny *v.* Pennock 178
Halseham *v.* Young 217
Halsey *v.* Fairbanks 325
v. Norton 469
v. Whitney 180, 182
Halstead *v.* Shepard 163, 164, 209, 295
Halsted *v.* Shmelzel 55, 280
Haly *v.* Goodson 558, 559
Hambidge *v.* De La Crouée 176, 179
Hamblin *v.* Dinneford 298
Hamer, *Ex parte* 484
Hamilton *v.* Benbury 427
v. Cummings 295, 308
v. Hamilton 280, 510
v. Seaman 389, 391
v. Summers 193, 201
Hammatt *v.* Wyman 394
Hammil *v.* Hammil 314, 420
Hammill *v.* Parvis 217
v. Stokes 296, 457
Hammon *v.* Roll 173
Hammond *v.* Douglas 263, 443, 445, 447, 503
v. Hammond 269
Hamper, *Ex parte* 49, 60, 67, 74, 92, 142, 291, 501, 508
Hand *v.* Armstrong 230
Hanff *v.* Howard 8, 372, 377, 378
Hankey *v.* Garrett 155, 492
Hanning *v.* Ferrers 494
Hanson *v.* E. & N. A. R. R. Co. 572

Harding *v.* Foxcroft 46, 148, 548, 551
v. Glover 313, 314
Hardy *v.* Sproule 551, 554, 565
v. Walters 18
Hare, *Ex parte* 493
v. Waring 546
Hargrave *v.* Conroy 66, 71
Hargreaves, *Ex parte* 480, 502
Hargroves *v.* Cooke 427
Harman *v.* Johnson 100
Harper *v.* Fox 176, 179
v. Lamping 155, 427, 437
v. Raymond 546, 547
v. Wrigley 201
Harrington *v.* Higham 176, 177
Harris, *Ex parte* 96, 97, 104, 393, 492, 494, 500, 503
v. Farwell 111, 348, 397, 422, 424, 425, 485
v. Lindsay 110, 421, 423, 425, 487
v. Murray 535
v. North Devon R. Co. 394
v. Pollard 367
v. Wall 19
v. Wilson 194
Harrison, *Ex parte* 548, 552, 554, 563, 564
v. Armitage 299, 300, 312, 459, 511, 512
v. Close 173
v. Devington 339
v. Fitzhenry 135, 292
v. Gardner 262, 306, 445
v. Heathorn 452, 545, 547
v. Jackson 174, 178, 180, 182, 199
v. Sterry 163, 165, 166, 183, 475, 481, 483
v. Tennant 381, 458, 467
Hart *v.* Alexander 110, 397, 413, 423, 424, 426, 485, 487, 488
v. Clarke 317, 403
v. Fitzgerald 337
v. Palmer 196
v. Tomlinson 434
v. Withers 110, 178, 179, 180
Hartley *v.* Kirlin 434
v. Wharton 19
Hartley's Case 77
Hartman *v.* Woehr 384
Hartness *v.* Thompson 23
Hartridge *v.* Rockwell 310
Hartung *v.* Siccardi 210
Hartz *v.* Schrader 307, 311, 312, 319, 442
Harvey *v.* Child 67
v. Crickett 269, 461, 469, 471, 476
v. Varney 242, 295, 315, 509
Harwood *v.* Edwards 174
Haskell *v.* Adams 279, 287
Haskins *v.* Warren 67
Haslet *v.* Street 174
Haslett *v.* Witherspoon 385
Hassels *v.* Simpson 476
Hastings *v.* Hopkinson 538
Hatch *v.* Crawford 181
Hatcher *v.* Seaton 275
Hathaway *v.* Haskell 188
Haughley *v.* Strickler 195
Haven *v.* White 288
Havens *v.* Hussey 166
Haviland *v.* Chace 532
Hawes *v.* Dunton 200
v. Tillinghast 60
Hawken *v.* Bourne 99, 170, 172, 233
Hawkins *v.* Appleby 150
v. Hawkins 387
Hawkshaw *v.* Parkins 180, 182, 309
Hawley *v.* Cramer 292, 475
v. Keeler 44
Hawtayne *v.* Bourne 99
Hay, *Ex parte* 148, 149, 488, 491
v. Fairbairn 496, 571
v. Mair 416
Hayden, *Ex parte* 348
Hayes *v.* Bement 533, 534, 535
v. Flowers 275
v. Heyer 166, 312, 314, 534
v. Reese 511
Haythorn *v.* Lawson 338, 339
Hayward *v.* French 103, 210
Haywood *v.* Harmon 196, 420
Hazard *v.* Hazard 59, 67
Heald *v.* Warren 111
Heane *v.* Rogers 495
Heap *v.* Dobson 201
Heard *v.* Bowers 251
Heart *v.* Rankin 365
Heartt *v.* Corning 242, 513, 520, 522
Heath, *Ex parte* 496
v. Hall 476
v. Hubbard 323, 556
v. Percival 397
v. Samson 111, 195, 211, 385, 400, 416, 468
Heathcote *v.* Hulme 155, 443
Heaton, *Ex parte* 155
Heckert *v.* Fegely 85, 144
Heckman *v.* Messinger 482
Hedderley, *Ex parte* 489
Hedge's Appeal 44
Hedley *v.* Bainbridge 100
Hefferman *v.* Brenham 36
Heimstreet *v.* Howland 89, 92
Helme *v.* Smith 271, 273, 548, 551, 552, 569
Helsby *v.* Mears 172, 434
Helton *v.* Granville 311
Henderson, *Ex parte* 22
v. Barbee 180
v. Hudson 8
v. Mayhew 566
v. McDuffie 569
v. Wild 173, 175, 210, 211

Hendrick *v.* Gunn 63
Henecy, *Ex parte* 473
Henley *v.* Soper 247, 278, 281, 283
Henn *v.* Walch 303, 304, 312, 314, 458
Hennessy *v.* Western Bank 183
Henniker *v.* Wigg 431, 433
Henry *v.* Birch 459
v. Jackson 543
Hepburn *v.* Curts 289
Heran *v.* Hall 51
Herbert *v.* Hanrick 181
Herberton *v.* Jepherson 393
Hercy *v.* Birch 236
Hergman *v.* Dettlebach 310
Herkimer, The 55
Herrick *v.* Ames 513
Herries *v.* Jamieson 273, 286, 350, 421
Herrin *v.* Eaton 323, 556
Hesham, *Ex parte* 479, 480, 501
Hesketh *v.* Blanchard 60, 74, 273
Hess *v.* Werts 541, 543, 544
Hester *v.* Lumpkin 209
Hewes *v.* Bayley 329
Hewett *v.* Buck 570
Hewitt *v.* Sturdevant 548, 550, 551, 563, 564
Heyden, *Ex parte* 499
v. Heyden 342, 353
Heyhoe *v.* Burge 6, 79
Heywood *v.* Watson 211
v. Wingate 326
Hiard *v.* Bigg 104
Hibbert *v.* Hibbert 13, 235
v. Martin 336
Hichens *v.* Congreve 325
Hickes *v.* Cook 515
Hickman *v.* Cox 57, 77, 80, 87, 90, 146
v. Runkle 202
v. Reineking 112, 203
Hicks *v.* Cram 31, 32, 120, 132
Hickson *v.* Aylward 516, 517
Higginbotham *v.* Holme 473
Higgins *v.* Packard 567
v. Thomas 323
Higginson *v.* Air 319
v. Fabre 517
Hill, *Ex parte* 473, 491
v. Burnham 503
v. Hollister 248
v. Manchester & Salford Water-Works Co. 546
v. Marsh 325
v. McPherson 289, 326
v. Southerland 428
v. Voorhies 63, 111, 171
v. Wiggin 210, 343, 352, 359
Hilliker *v.* Loup 292
Hills *v.* Bailey 277
v. McRae 348
v. Nash 301
v. Ross 174
Hilton *v.* Eckersley 410
Hinds *v.* Terry 323
Hindy *v.* Margarity 19
Hine *v.* Lart 265
Hine, The, *v.* Trevor 568
Hinkie *v.* Reid 284
Hinton, *Ex parte* 473, 491
v. Law 550, 551
Hiscock *v.* Philips 365
Hitchcock *v.* St. John 166
Hitchings *v.* Ellis 51
Hite *v.* Hite 394
Hoag *v.* McGinnis 251
Hoare *v.* Allen 28
v. Clement 569
v. Dawes 33, 41, 44, 62, 105, 132, 145, 291
Hobart *v.* Andrews 516
v. Howard 421
Hobbs *v.* Memphis Ins. Co. 336
v. Wilson 409
Hoby *v.* Roebuck 395, 437
Hodenpyl *v.* Vinnerhold 196
Hodges *v.* Dawes 85
v. Harris 166
v. Holeman 167, 503
Hodgkinson, *Ex parte* 48, 76, 111, 148, 149, 174, 290, 488, 501
Hodgman *v.* Smith 81
Hodgson, *Ex parte* 348, 473, 522
v. Butts 571
v. Murray 308
v. Temple 9
Hodsden *v.* Staple 496
Hoe *v.* Richards 515
Hoffman *v.* Duncan 315, 318
v. Pitt 496
Hogaboom *v.* Herrick 424
Hogan *v.* Reynolds 172, 176
Hogg *v.* Ellis 535, 536
Hogle *v.* Low 365
Holbrook *v.* Wight 156
Holcroft *v.* Hoggins 104
Holden *v.* M'Makin 265, 316, 444
v. Peace 224
Holderness *v.* Shackles 167, 351, 503, 506, 551, 563
Holdredge *v.* Gwynne 113
Holdsworth, *Ex parte* 147
Holland *v.* Drake 166
v. Fuller 364, 372
v. Holland 516
v. Leed 332
v. Weld 331
Holliday *v.* Cumsell 323
Hollifield *v.* White 44
Holloway *v.* Brinkley 44
Holman *v.* Johnson 11
Holm *v.* Hammond 93
Holme *v.* Green 186
Holmes *v.* Blogg 18, 20
v. Burton 100, 104
v. Hawes 346, 351
v. Higgins 39, 52, 229, 268, 271, 526, 541, 545

Holmes *v.* Mentze 352
v. Old Colony R. R. Co. 17, 82, 85
v. Porter 132
v. United Ins. Co. 45
v. Williamson 273, 285, 286, 287
Holt *v.* Kernodle 81
v. Ward 21
Holyoke *v.* Mayo 278
Homer *v.* Wood 202, 211, 289, 293, 294
Homfray *v.* Fothergill 234, 521
Honore *v.* Colmesnil 224, 229, 261, 443, 524, 552
Hood *v.* Acton 212, 305, 307, 340
Hook *v.* Stone 166
Hookham *v.* Pottage 263
Hoop, The 27
Hooper *v.* Lusby 175, 557
Hope *v.* Cust 111, 205, 207, 217
Hopkins *v.* Banks 189, 193
v. Chittenden 230
v. Forsyth 548
v. Smith 40, 148
v. Watt 225
Hopkinson *v.* Smith 17
Horbach *v.* Huey 329, 331
Horn *v.* Baker 493, 496
v. Gilpin 557, 562, 568
Horne *v.* Clarkson 336
Horsley *v.* Rush 180
Horton *v.* Chid 108
v. Soyer 177
Horton's Appeal 160, 168, 400
Hosack *v.* Rogers 173, 517
Hoskins *v.* Johnson 346
v. Slayton 553
Hotchkiss *v.* English 201
Houghton, *Ex parte* 493, 496
v. Houghton 364, 372, 374
Hourguebie *v.* Girard 280
Houseal & Smith's Appeal 481
How *v.* Kane 65, 109
Howard, *In re* 67
v. Cobb 195
v. Priest 364, 372, 373, 374
Howe *v.* Thayer 380, 406, 414, 418, 419
Howell *v.* Adams 413
v. Brodie 12, 13, 271
v. Harvey 13, 296, 381, 401, 457, 458, 459
v. Howell 366
v. Reynolds 330, 337
Howland, *In re* 494
Hoxie *v.* Carr 345, 364, 365, 366, 367, 371, 503
Hubbard, *Ex parte* 482
v. Callahan 230
v. Curtis 343, 346, 349
v. Guild 318, 319, 472
Hubbell *v.* Woolf 213
Hubert *v.* Nelson 200
Hudson *v.* Barrett 301, 512
Huey *v.* Horbach 330
Huggett *v.* Montgomery 157
Hughes, *Ex parte* 506
v. Ellison 166, 180
v. Morris 550
v. Wheeler 486
Hull *v.* Garner 179
Human *v.* Cuniffe 184
Hume *v.* Bolland 154, 155
Humphries *v.* Chastain 391
v. McCraw 439
Hunsden *v.* Cheyney 494
Hunt *v.* Benson 364, 365
v. Bridgham 188, 424
v. Chapin 99
v. Clark 463
v. Gookin 510
v. Hall 172
v. Morris 284
v. Royal Ex. Ass. Co. 196
v. Waterman 346, 351
Hunter, *Ex parte* 104, 213, 478, 493, 499, 502
v. Galliers 473
v. Rice 497
Huntington *v.* Potter 393
Hurd *v.* Darling 323, 556
v. Haggerty 202
Husband, *Ex parte* 491, 498, 499
Hussey *v.* Allen 566
v. Christie 553
v. Dole 475
v. Jewett 21
Hutchins *v.* Bank of Tenn. 412, 415, 419
v. Hope 514
v. Hudson 172, 415
v. Sims 413, 415
v. Turner 157
Hutchinson *v.* Smith 155
v. Whitfield 385
Hutton *v.* Eyre 173, 272, 287
Hyat *v.* Hare 163
Hyde *v.* Brashear 447
v. Stone 323, 324, 339, 555, 556
Hynes *v.* Stewart 13, 296

I.

Ibbotson *v.* Elam 234, 521
Iddings *v.* Bruen 321
Ide *v.* Ingraham 192, 390
Ilsley *v.* Jewett 188, 486, 567
Inbusch *v.* Farwell 35
Indian Chief, The 224
Ingliss *v.* Grant 474
Ingraham *v.* Foster 13, 296
Innes *v.* Lansing 442, 533
v. Stephenson 172
Irby *v.* Graham 449

Irby *v.* Vining 414
Irvine *v.* Forbes 43, 219, 545
Irving *v.* Excelsior Fire Ins. Co. 51, 175, 336
v. Young 520
Irwin *v.* Conklin 66
Isler *v.* Baker 423, 424, 466
Ives *v.* Miller 271, 272, 274

J.

Jacaud *v.* French 173
Jackson, *Ex parte* 148, 149, 435, 436, 486
In re 17
v. Alexander 292
v. Anderson 323
v. Cator 494
v. Clymer 481
v. Fairbank 186
v. Jackson 53, 54, 441
v. Mayo 21
v. Porter 181
v. Robinson 46, 148, 548, 551
v. Sedgwick 234, 238, 242, 302, 503, 519
v. Sheldon 533
v. Stanford 180, 367
v. Stopherd 274, 281, 282, 510
v. Todd 152
Jacky *v.* Butler 342, 353
Jacobs *v.* Fatherstone 24
v. McBee 197
Jacobsen *v.* Hennekenius 31, 322
Jacobson *v.* Williams 483
Jacquin *v.* Buisson 319, 442, 531, 536
Jaffray *v.* Frebain 22
Jaggers *v.* Binnings 196, 552
James *v.* Bixby 554, 565, 566
v. Bostwick 109, 510
v. Woodruff 546
Janes *v.* Whitbread 57, 146
Jaques *v.* Hulit 280
v. Marquand 104, 105, 155, 213
Jarvis *v.* Brooks 349, 364, 378, 482
v. Hyer 352
v. Peck 410
Jefferson, The 504
Jefferson Ins. Co. *v.* Cotheal 335
Jeffreys *v.* Small 1, 362, 441, 548
v. Smith 36, 317, 382, 385, 400, 546, 547
Jell *v.* Douglass 329
Jenkins *v.* Blizard 414, 419
Jennings *v.* Estes 133, 195
v. Griffiths 552, 553, 566, 569
v. Randall 158
Jennison *v.* Hapgood 505
Jepson, *Ex parte* 484
Jerusalem, The 568
Jervis *v.* White 307, 340, 518
Jessup *v.* Cook 224, 520
Jestons *v.* Brooke 141, 142
Jewett, *In re* 60, 116, 469, 475
Jewson *v.* Moulson 483
Johan and Sigmund, The 562
John, The 559
Johns, *Ex parte* 501
v. Battins 181
Johnson *v.* Beardslee 188
v. Boone 430
v. Byerly 152
v. Curtis 516
v. Evans 352, 353, 385, 400
v. Hudson 9
v. McDonald 539
v. Miller 85
v. Peck 174, 211
v. Shrewsbury, &c. R. Co. 298
v. Totten 413, 420
Johnson's Executors *v.* Ketchum 513
Johnston *v.* Dutton 97, 219, 220
v. Freer 324
v. Warden 104, 195
Jonau *v.* Blanchard 533
Jones, *Ex parte* 484, 493, 496
v. Bailey 176, 178
v. Blum 566
v. Booth 112, 203
v. Brown 323
v. Caperton 36
v. Clayton 350
v. Dwyer 496
v. Gates 329
v. Harraden 273
v. Herbert 174, 175
v. Howland 493
v. Jackson 157
v. Jones 261, 480
v. Latimer 516
v. Lees 410
v. Mars 214
v. Maund 427
v. McMichael 8, 438
v. Morgan 295
v. Neale 364, 372
v. Noy 464, 465
v. Parsons 168
v. Perry 308
v. Phœnix Bank 21
v. Turk 345, 346, 351, 353
v. United States 432
v. Yates 205, 209, 211, 288, 293, 294, 295, 458
Jonge Pieter, The 27
Jonge Tobias, The 552, 554
Jons *v.* Perchard 37
Jordan *v.* Lewis 251
v. Wilkins 96
Josephs *v.* Pebrer 542, 546, 547
Joslyn *v.* Smith 188, 189
Joy *v.* Campbell 497
Joyce *v.* Williams 203
Judd *v.* Gibbs 483

Judd *v.* Harris 270
Judge *v.* Braswall 99
Judson *v.* Adams 84
v. Gibbons 23
Julia, The 27, 28, 327
Julio *v.* Ingalls 8
Justin *v.* Ballam 569

K.

Kaiser *v.* Wilhelm 73
Kane *v.* Scofield 199
Karason, The 572
Karthaus *v.* Ferrer 176
Kaskaskia Bridge Co. *v.* Shannon 196
Katsch *v.* Shenck 314, 508
Kawshaw *v.* Kawshaw 25
Kay *v.* DePienne 24
Keane *v.* Boycott 18
v. Fisher 292
v. Johnson 198
Keasley *v.* Codd 545
Keating *v.* Marsh 154, 155
Kedie, *Ex parte* 486, 487
Keene *v.* Harris 265
Keene's Executors, *In re* 26, 162
Keesley *v.* Cadd 541
Keith *v.* Fink 493
Kelby *v.* Steel 272
Kell *v.* Nainby 23, 134, 135, 292
Kelley *v.* Greenleaf 209, 224, 229, 231, 295, 394
v. Hurlburt 33, 63, 415
v. Sanborn 190
Kellogg *v.* Fancher 210
v. Griswold 59
Kelly *v.* Eckford 312
v. Kauffman 285, 287
Kelshaw *v.* Jukes 44
Kemble *v.* Farren 251, 252
v. Kean 298, 299
Kemeys *v.* Richards 203
Kemp *v.* Camley 166
v. Coffin 391
Kendall, *Ex parte* 345, 348, 485, 488, 506
v. Rider 364
Kendrick *v.* Campbell 189, 192
v. Tarbell 126, 215
Kennebec Co. *v.* Augusta Ins. & Banking Co. 175
Kennedy *v.* Bohannon 416
v. Kennedy 381, 459, 512
v. Lee 262, 263, 409, 445
v. M'Fadon 284, 286
Kenney *v.* Atwater 413
Kensington, *Ex parte* 332, 348
Kerr *v.* Hawthorne 450
v. Potter 58
Kerridge *v.* Hesse 434
Kershaw *v.* Matthews 314, 439, 452
v. Kelsey 27
Ketcham *v.* Clark 159, 168, 411, 412, 414
Ketchum *v.* Durkee 104, 433, 442
Kibbler *v.* De Forrest 216
Kidder *v.* Page 210
Kiddwelly Canal Co. *v.* Raby 545
Kieran *v.* Saunders 135
Kiffin *v.* Willis 157
Kilby *v.* Wilson 153
Kilgore *v.* Powers 230
Kilgour *v.* Finlyson 411, 413
Killam *v.* Preston 280, 282, 283, 520
Kimball *v.* Hamilton Fire Ins. Co. 166
v. Walker 103
v. Whitney 448
Kimberly *v.* Jenning 298
Kimbro *v.* Bullitt 99
King, *Ex parte* 477, 500, 501, 502
v. Accumulative Assurance Co. 383
v. Dodd 541, 544
v. Faber 112, 203
v. Hamilton 229
v. Hoare 108
v. Lowry 551, 553, 554, 567
v. Rock 481
v. Sanderson 481
v. Smith 173, 393, 196
v. Weeks 365
Kingman *v.* Spurr 11, 12, 159, 160, 162, 168, 546
Kinkead, *In re* 25
Kinloch *v.* Hamlin 510
Kinnersley *v.* Mussen 179
Kinsler *v.* Pope 111
Kinsman *v.* Barker 516
v. Dullam 127
Kirby, *Ex parte* 112, 206
v. Cannon 23
v. Carr 464, 465
v. Cogswell 200, 329
v. Hewitt 195
v. Ingersoll 166
Kirk *v.* Blurton 128
v. Hiatt 190, 193
v. Hodgson 219
Kirkley *v.* Hodgson 496
Kirkman *v.* Booth 456
v. Newstead 331
v. Snodgrass 413
Kirkpatrick *v.* Turnbull 164
Kirwan *v.* Kirwan 110, 111, 397, 421, 426, 435, 485, 487
Kitchen *v.* Bank 230
v. Bartsch 471
Kleine *v.* Shanks 372
Kline *v.* Beebe 21
Knapp *v.* McBride 202, 438
Knebell *v.* White 299, 300, 512
Knerr *v.* Hoffman 353
Knight *v.* Earl of Plymouth 456
v. Marjoribanks 225
Knott *v.* Morgan 265, 340
Knowles *v.* Haughton 10, 301, 511, 512
Knowlton *v.* Reed 439
Knox *v.* Campbell 548, 551

Knox *v.* Simmons 481
Kohler *v.* Smith 234
Kramer *v.* Arthurs 37, 378
Krebs *v.* O'Grady 24
Krueger, *In re* 134, 397, 409
Kyle *v.* Kyle 522
v. Roberts 510

L.

Lacey, *Ex parte* 515
Lachaise *v.* Marks 532, 535, 537, 538
Lachomette *v.* Thomas 189, 532, 536, 537
Lacy *v.* Le Bruce 325, 326
v. McNeile 172, 192, 196
v. Walcott 212, 474
v. Waring 364
Ladbroke, *Ex parte* 491
Ladd *v.* Griswold 345
Lafon *v.* Chinn 104
Laforest, *Ex parte* 491
Lagow *v.* Patterson 179
Lake *v.* Gibson 258, 441
Lallande *v.* McRae 103
Lamalere *v.* Caze 278, 280, 282, 520
Lamb *v.* Durant 163, 548, 549, 550, 551, 552, 556
v. Grover 51
Lambden *v.* Sharp 181
Lambert's Case 163
Lambeth *v.* Vawter 193
Lancaster Bank *v.* Negley 372
Lancaster Canal Co., *Ex parte* 546
Lanckton *v.* Wolcott 489
Lane, *Ex parte* 487, 491
v. Felt 360
v. Tyler 278
v. Williams 199, 201
Lang *v.* Keppell 447
v. Waring 216, 368, 372, 373, 375, 376
Langan *v.* Hewett 96, 216
Langdale, *Ex parte* 42, 75, 132, 322, 495
Lange *v.* Kennedy 194
Langer *v.* Kennedy 411
Langham *v.* Bewett 23
Lanier *v.* McCabe 100, 112, 203
Lansdale *v.* Brashear 36
Lansing *v.* Gaine 100, 113, 202, 391, 411, 413, 526
v. M'Killup 174, 196, 420
v. Ten Eyck 99, 112
Lapham *v.* Green 292, 334
Larazzabel *v.* Gorbea 504
Larch, The 552, 563, 570
Lascaridi *v.* Gurney 7
Lash *v.* Lambert 230
Latham *v.* Kenniston 195, 273
Laugher *v.* Pointer 156
Laughlin *v.* Loring's Adm. 439
Laverty *v.* Burr 112, 202, 204, 216
Law *v.* Cross 227
v. Ford 163, 316, 317, 319
Lawes, *Ex parte* 234
Lawless *v.* Mansfield 517
Lawrence, *Ex parte* 496
v. Clark 286
v. Dale 175
v. Sebor 336
v. Taylor 163, 183
v. Trustees of Orphan House 349
Lawson *v.* Lovejoy 18, 19
v. Morgan 305, 310, 311, 312
Laycock, *Ex parte* 484
Layfield's Case 97
Layton, *Ex parte* 291
v. Hastings 179, 180
Lea *v.* Guice 63, 99, 196
Leach *v.* Church 440
v. Leach 226, 394, 446, 525
Leaf, *Ex parte* 412
v. Coles 464
Leake *v.* Craddock 1
Lean *v.* Schutz 23
Leane *v.* Bray 157
Leavitt *v.* Peck 96, 97, 98, 134
Leaycraft *v.* Dempsey 516
Lechmere *v.* Fletcher 108, 4. 0
Leddo *v.* Hughes 568
Lee, *In re* 483
v. Bennett 25
v. Gibbons 334
v. Lashbrooke 229, 261, 394
v. Onstott 180
Lee's Admr. *v.* Reed 513
Leeds & Thirsk R. R. Co. *v.* Fearnley 21
Lees, *Ex parte* 22
v. Laforest 893
Le Faun *v.* Macolmson 338, 339
Lafavour *v.* Yandes 190, 193
Lefever *v.* Underwood 223
Lefevre *v.* Boyle 333
Lefevre's Appeal 7
Legge *v.* Harlock 251
Leggett *v.* Hyde 67, 75, 92
Leigh *v.* Everhart 308
Leighton *v.* Wales 251
Leonard *v.* Huntington 550, 565, 566
Le Roy *v.* Johnson 104, 125, 126, 200, 212, 255, 411
Leslie *v.* Wiley 152
Lessig *v.* Langton 312
Levally *v.* Ellis 480
Leveck *v.* Shaftoe 292
Lever *v.* Fletcher 11
Leverson *v.* Lane 112, 204
Levett, *Ex parte* 521
Levy *v.* Cadet 190, 193
Levy *v.* Pyne 100
Lewis *v.* Chapman 338, 339
v. Conrad 480

Lewis *v.* Greider 44, 51
v. Langdon 263, 265, 308, 444, 445
v. Lee 24
v. Moffett 230
v. Pead 513
v. Reilly 387
v. Westner 103
Liddiard, *Ex parte* 110, 487
Liddle, *Ex parte* 291, 491, 499
Lightfoot *v.* Heron 29
Lightoller, *In re* 480
Lillard *v.* Turner 25
Lilly *v.* Kroesen 516
Lime Rock Bank *v.* Phetteplace 365
Lime Rock Ins. Co. *v.* Treat 201
Limpus *v.* London Omnibus Co. 572
Lindsey *v.* Edminston 31
Linford *v.* Linford 481
Lingard *v.* Bromley 287
Lingen *v.* Simpson 167, 297, 351, 492, 507
Lintner *v.* Milliken 44
Linton *v.* Hurley 152
L'Invincible 572
Litchfield, *In re* 478
Littell *v.* Fitch 202
Little *v.* Snedecor 365
Littlewood *v.* Caldwell 312, 458, 521
Livermore *v.* Rand 432
Livingston *v.* Cox 36
v. Hastie 112, 202, 203, 526
v. Lynch 222, 545
v. Radcliff 110
v. Ralli 177, 247, 248
v. Roosevelt 39, 100, 101, 112, 163, 175, 199, 200, 201, 202, 212, 526
Lloyd, *Ex parte* 164
v. Archbowle 33, 292, 501
v. Ashby 64, 201
v. Bellis 156
v. Loaring 219, 545
v. Passingham 513
v. Thomas 194
Lobb, *Ex parte* 148, 149, 486, 488
Locke *v.* Stearns 150, 152, 156
Lockwood *v.* Comstock 388, 391
Lockyer *v.* Savage 473
Lodge, *Ex parte* 492, 494, 500
v. Dicas 110, 397, 421, 422, 475, 485, 487, 488
Loeschield *v.* Hatfield 440
Loeschigk *v.* Addison 440
Logan *v.* Bond 104
v. Mason 432
Lomas *v.* Bradshaw 274
London Ass. Co. *v.* Bold 333
Long *v.* Carter 216, 217
v. Majestre 227, 306
v. Story 388, 391
Longman *v.* Pole 151, 211, 294, 340
Loomis *v.* Marshall 44, 83, 85, 87, 90, 91
v. McKennie 459
v. Pierson 174
Lord *v.* Baldwin 292, 360, 449, 501
v. Proctor 73
Loring *v.* Brackett 174
Loscombe *v.* Russell 299, 300, 304, 458, 460, 512
Lothrop *v.* Wightman 483
Lottimer *v.* Lord 320
Love *v.* Moynehan 24
Lovejoy *v.* Bowers 167, 350
v. Spofford 397, 413
Lovelace's Case 180
Lovell *v.* Hicks 151, 265
Lowe *v.* Farlie 515
v. Miller 323
v. Peers 251
Lowery *v.* Drew 181
Lowndes *v.* Taylor 309
Lowry *v.* Brooke 42, 49, 59
Lowther *v.* Chappell 190
Loyd *v.* Freshfield 103, 104, 172, 175, 213
Lucas *v.* Bank of Darien 175, 183, 413, 419, 420
v. Beach 271, 545
v. De la Cour 196
v. Laws 343, 353
v. Sanders 179, 181
Ludlow *v.* Cooper 37, 363, 372
v. Simond 180
Ludwick *v.* Huntsenger 230
Luke *v.* Gibson 548
Lumberman's Bank *v.* Pratt 390
Lumley *v.* Wagner 298
Lunt *v.* Stevens 173
Lupton *v.* Janney 514
Lusk *v.* Smith 391
Lyles *v.* Styles 163, 224
Lyman *v.* Lyman 39, 231
Lynch *v.* Bitling 242, 514
Lyndon *v.* Gorham 343, 353, 359, 360
Lyon *v.* Haines 386
Lysagt *v.* Walker 431
Lyster *v.* Dolland 441
Lythe *v.* Ault 422, 485, 487

M.

McAlister *v.* Montgomery 373
M'Arthur *v.* Bloom 24
v. Ladd 59, 180, 275
McBride *v.* Hagan 178, 179, 182, 325
v. Protection Ins. Co. 133
McCalmont *v.* Rankin 550
McCart *v.* Lewis 181
v. Nixon 447
McCauley *v.* Cleveland 60
M'Cauley *v.* M'Farlane 492, 500
McClelland *v.* Remsen 165
Mackay *v.* Bloodgood 180

Mackellar *v.* Wallace 513
Mackenzie *v.* Pooley 566
Mackintosh *v.* Mitcheson 568
Maclue *v.* Sutherland 128, 214
McClung *v.* Capehart 509
M'Coll *v.* Oliver 278, 281
McCombe *v.* Dunch 481
McConkey *v.* Rogers 289
McConnell *v.* McConnell 475
v. Hector 28, 327
McCord *v.* Field 99
McCormick's Appeal 377, 480
McCowin *v.* Cubbison 194
McCracken *v.* Ware 315, 316
M'Crillis *v.* How 18
McCulloh *v.* Dashiell 345, 349, 448, 449, 483, 503
M'Cullough *v.* Sommerville 163, 166, 183
M'Cutchin *v.* Bankston 194, 196
M'Dermot *v.* Laurence 366, 378
M'Donald *v.* Eggleston 181
v. Millaudon 63, 80
M'Dowall *v.* Wood 24
M'Fadden *v.* Hunt 289
M'Farland *v.* Crary 151
McGae, *Ex parte* 332
McGar *v.* Drake 105
McGaw *v.* Marshall 18
McGill *v.* Brown 545
M'Ginn *v.* Shaeffer 21
McGowan *v.* Bank of Kentucky 199
v. McGowan 263
McGraw *v.* Pulling 6, 238
M'Gregor *v.* Bainbridge 261
v. Cleveland 99
v. Ellis 163
McGuire *v.* Ramsay 364
McIntire *v.* McLaurin 328
v. Oliver 189
M'Ireath *v.* Margetson 224
M'Iver *v.* Humble 132, 148, 419, 495
McKacy *v.* Hebb 511
McKee *v.* Bank of Mt. Pleasant 109, 178, 179
v. Stroup 173, 175, 210
McKenna *v.* George 569
McKenzie *v.* Garrison 476
v. Nevius 432
McKinney *v.* Alvis 485
v. Brights 203
McKnight *v.* McCutchers 269
v. Ratcliff 151, 533
McKowen *v.* McGuire 440
McLanahan *v.* Ellery 330
McLane *v.* Abrams 230
McLean, *In re* 349, 480
McLellan *v.* Cumberland Bank 173
McMaster *v.* Vernon 108
M'Minn *v.* Richmonds 18
McMullan *v.* Mackenzie 132
M'Nair *v.* Fleming 201, 215
v. Platt 210
McNaughten *v.* Partridge 107, 108, 109, 178, 181, 510
McNeely *v.* Haynes 150
M'Neill *v.* Reid 13, 237
McNutt *v.* Strayhorn 166
McPherson *v.* Rathbone 133, 194
McRae *v.* McKenzie 299, 512
McWhorter *v.* McMahan 180, 183
Mabbett *v.* White 166
Machell, *Ex parte* 482, 553
v. Kinnear 334
Macy *v.* Combs 86
v. DeWolf 548, 550, 551, 554, 563
Maddeford *v.* Austwick 225, 229
Maddox *v.* Dent 517
v. Goddard 556
Madgwick *v.* Wimble 316, 319
Madison County Bank *v.* Gould 532, 533, 538, 539
Magill *v.* Menie 412, 413
Mainwaring *v.* Newman 288, 325
Mair *v.* Glennie 48, 59, 77, 571
Maise *v.* Garner 308
Major *v.* Hawkes 396
Maley *v.* Newman 468
Maltby *v.* N. W. Va. R. Co. 102
Manahan *v.* Gibbons 272
Manck *v.* Manck 365
Manderston *v.* Robertson 186
Mandeville *v.* Mandeville 42
Maneely *v.* McGee 486, 567
Manhattan Co. *v.* Ledyard 199
Manhattan Brass Co. *v.* Sears 67, 75
Mann *v.* Connell 381
v. Locke 190, 192
Manning *v.* Hays 202
v. Wadsworth 236, 237, 271, 275
Mansfield *v.* Watson 29
Mant *v.* Mainwaring 194
Manuf. & Mech. Bank *v.* Gore 152
v. Winship 129, 130, 202
March *v.* N. W. Ins. Co. 44
Marengo, The 559, 560
Margaret, The 559, 561
Marietta Iron Works *v.* Lattimer 230
Marine Bank *v.* Ogden 30
Marine Co. *v.* Carver 113
Marion, The Schooner 568
Mariott *v.* Shaw 342
Markham *v.* Jones 120
v. Markham 25
v. Merrett 363, 366, 367, 371, 373
Marlett *v.* Jackman 438, 439, 442, 449
Marquand *v.* N. Y. Manuf. Co. 12, 159, 160, 161, 168, 400, 462, 469, 471, 472, 546, 547
v. Webb 565, 566
Marsh *v.* Gold 36, 175
v. Hutchinson 23, 24

Marsh *v.* Keating 154
v. Ward 149
Marsh's Appeal 223, 230
Marshall *v.* Colman 126, 254, 275, 303, 304, 307, 458, 459, 510, 512
v. Johnson 243
v. Lambeth 537, 538
v. Marshall 382
v. Morum 572
v. Rutton 23
Marten *v.* Van Schaick 264, 315, 316, 317
Martin *v.* Brydges 187
v. Kirk 389, 391
v. Mayo 19, 21
v. Root 188, 195
v. Thrasher 176, 177
v. Walton 388, 413
Marvin *v.* Trumbull 365
Marzetti *v.* Williams 158
Mason *v.* Connell 12, 160, 175, 404, 546
v. Eldred 65
v. Hackett 67
v. Jouett 173
v. Potter 59, 89
v. Wickersham 111
v. Wright 18
Masson, *Ex parte* 491
Master *v.* Kirton 305, 307, 384, 459
Mathews *v.* Felch 132, 133
Mathewson *v.* Clarke 12, 160, 168, 547
Matlock *v.* Matlock 343, 345, 364, 366, 372
Matthews, *Ex parte* 66, 132, 290, 501, 571
v. Dare 411
v. Wallyn 517
Maude *v.* Rodes 459
Mauldin *v.* Branch Bank 112, 203, 212, 216, 412
Maund *v.* Allies 516
Mawman *v.* Gillett 31, 292
Mawson *v.* Blane 19
Max *v.* Roberts 157, 158
Maxwell *v.* Day 110
v. Deare 486
v. Jameson 287
v. Port Tennant Co. 394
May *v.* Chapman 205, 213
v. Clark 395
Mayberry *v.* Bainton 217
v. Willoughby 190
Mayer *v.* Clark 346
Mayhew *v.* Eames 196
v. Herrick 323, 339, 352, 353, 555, 556
Maymott *v.* Maymott 230
Maynard *v.* Fellows 201
Mead *v.* Tomlinson 105, 106
v. Wheeler 251
Meaghan, *In re* 473
Mealier *v.* Cox 7, 44, 160, 161, 381, 437
Mears *v.* Serocold 178
Mebane *v* Mebane 516
Mechanics' Bank *v.* Foster 103, 211
v. Hildreth 391
v. Seton 475
Medbury *v.* Watson 331, 337, 338
Meech *v.* Allen 349
Meggett *v.* Finney 189, 190
Meliorachi *v.* Royal Ex. Ass Co. 517
Melledge *v.* Boston Iron Co. 111, 567
Mellen *v.* Whipple 335
Mellersh *v.* Keen 403, 465
Melville *v.* Brown 449
Menagh *v.* Whitwell 353
Menkins *v.* Lightner 29
Mercantile Bank *v.* Cox 63, 129
Mercein *v.* Andros 203, 204
Mercer *v.* Toler 193
Merrick *v.* Avery 568
v. Brainard 400
Merrill *v.* Bartlett 548, 552, 553, 563, 564
Merrit *v.* Pollys 413, 418
Merritt *v.* Walsh 549, 550
v. Williams 413
Merryweather *v.* Nixon 273, 286, 287
Mersereau *v.* Norton 323, 556
Mershon *v.* Hobensack 132
Merwin *v.* Shailer 568
Metcalf *v.* Bruin 333
v. Fouts 389
v. Redman 8
v. Royal Exch. Ass. Co. 6, 55, 164, 322
Metcalfe *v.* Rycroft 178, 180, 333
Metropolitan Saloon Omnibus Co. *v.* Hawkins 340
Meux *v.* Humphrey 174, 214
Meyer *v.* Larkin 104
v. Sharpe 48
Mifflin *v.* Smith 39, 40, 63, 104, 126, 129, 239, 446
Milbank *v.* Revett 313, 314
Milburn *v.* Codd 268, 272, 286, 545
v. Guyther 548, 558
Miles *v.* Thomas 224, 304, 399, 512
Millar *v.* Craig 517, 522
Millard *v.* Hewlett 19
Miller *v.* Andres 290, 510
v. Bartlett 80, 145
v. Consolidation Bank 215
v. Douglass 212
v. Estill 345, 346, 351
v. Fenton 287
v. Hines 100, 112, 202
v. Hughes 80
v. Jones 440
v. Manice 64, 104, 172, 201
v. Neimerisk 193
v. Price 51
v. Sims 21
v. Thompson 200
v. Thorn 325, 326

Miller *v.* Wornack's Adm's 516
Millerd *v.* Thorn 110
Millikin *v.* Gardner 516
v. Loring 390
Mills *v.* Argall 167, 533
v. Barber 163, 165, 178
v. Boyd 487
v. Hanson 518
v. Hyde 569
v. Osborne 247
Miln *v.* Spinola 566, 571
Milne *v.* Bartlet 463, 466
v. Moreton 475
Milnes *v.* Cowley 513
Milton *v.* Mosher 164, 183
Miner *v.* Downer 121
v. Pierce 210
Minnit *v.* Whinnery 97, 393, 413
Minor *v.* Gaw 210, 211
Miser *v.* Trovinger 196
Mitchell, *Ex parte* 174
v. Cockburne 10
v. Dall 33, 292, 416, 427
v. Harris 248
v. Ostrom 193, 391
v. Reed 226
v. Reynolds 410
v. Roulstone 195
v. Tarbutt 156, 157
v. Williams 156
Mitcheson *v.* Oliver 554, 565, 566
Mitchum *v.* Bank of Kentucky 412
Moale *v.* Hollins 65, 107
Moddewell *v.* Keever 11, 159, 160, 168, 546
Moderwell *v.* Mullison 378
Modisett *v.* Lindley 180
Moffat *v.* Farquharson 553, 558
v. Moffat 66, 509
v. Van Milligen 288, 325
Mohawk & Hudson R. R. Co. *v.* Niles 55
Moline Co. *v.* Webster 481
Moller *v.* Lambert 333
Molony *v.* Davis 271
Molwo *v.* Court of Wards 67
Moneypenny *v.* Hartland 545
Monkhouse *v.* Hay 496
Monroe *v.* Conner 98, 381
v. Ezzell 292
Montagu *v.* Smith 333
Montague *v.* Reakert 194
Montgomery, *Ex parte* 506, 525
v. Boone 178, 184
Montjoys *v.* Holden 324
Moody *v.* Buck 557
v. Payne 309, 310, 343, 352, 461, 480
v. Rathburn 7
Mooers *v.* White 514
Moon *v.* Story 443
Moore, *Ex parte* 479
v. Bare 168
Moore *v.* Gano 289
v. Hill 330
v. Lackman 194
v. Sample 310
v. Smith 60, 89
Moran *v.* Palmer 364
Moravia *v.* Levy 278, 280, 521
Moreau *v.* Saffarans 364, 366
Moredon *v.* Wyer 174
Moreton *v.* Hardern 156, 157
Morgan, *Ex parte* 174
v. His Creditors 349, 448
v. Richardson 179
v. Stearns 67
Morin *v.* Martin 269, 287
Morisset *v.* King 141, 142
Moritz *v.* Peebles 244, 299
Morley *v.* Gaisford 157
Morris *v.* Allen 224, 231
v. Barrett 364, 365, 366
v. Colman 243, 298, 299
v. Harrison 452, 454, 520
v. Jones 179
v. Keasly 372, 374
Morrison *v.* Atwell 164
v. Blodgett 167, 310, 343, 351, 352, 358, 359
v. Cole 44
v. Kuntz 349
v. Stockwell 274
Morrow *v.* Riley 282, 510
v. Saunders 237
Morse *v.* Bellows 182, 392
v. Wilson 141, 142
Morton *v.* Croghan 23
v. Webb 292
Moser *v.* Libenguth 110
Moss *v.* Jerome 66
v. McCall 230
v. McCullough 65
Motley *v.* Dounman 340
v. Jones 59
Motteux *v.* St. Aubin 179
Moule, *Ex parte* 22
Moult, *Ex parte* 448, 491, 498, 499
Mountstephen *v.* Brooke 175
Mowatt *v.* Howland 413
Mudd *v.* Bast 34
Muldon *v.* Whitlock 111, 554, 565, 566
Mulford *v.* Griffin 414
Mulhollan *v.* Eaton 517
Mullany *v.* Kerman 52
Mullett *v.* Hook 291
Mumford *v.* McKay 386
v. Murray 483
v. Nicoll 39, 99, 548, 550, 551, 552, 554, 563, 564
Munroe *v.* Cooper 212
v. Ezzell 334
Murdock *v.* Chenango, &c. Co. 336
Murphy, *In re* 473
Murray *v.* Bogert 11, 159, 278, 287, 546

Murray *v.* Col. Ins. Co. 336
v. Mumford 324, 447, 450
v. Murray 167, 343, 348, 349, 442, 472, 473, 475, 482, 503
v. Richards 14
v. Somerville 104
v. Toland 520
Murrill *v.* Neill 349, 483
Muse *v.* Donelson 190
Musgrave *v.* Drake 113, 211
Musier *v.* Trumpour 44, 283
Musson *v.* Fales 569
v. May 450
Mutual Benefit Life Ins. Co. *v.* Hildyard 27
Mutual Institution *v.* Enslin 388
Muzzy *v.* Whitney 58
Myatts *v.* Ball 194
Myers *v.* Edge 332
v. Huggins 389
v. Smith 349, 395
v. Willis 566, 571
v. Winn 272
Myrick *v.* Dame 289

N.

Nall *v.* McIntyre 209, 293
Napier *v.* Catron 179, 180, 181, 510
v. M'Leod 182, 393
National Bank *v.* Norton 193, 389, 391, 415, 420
v. Sprague 365, 493
National Exc. Co. *v.* Drew 150, 156
Natusch *v.* Irving 197, 222, 239, 304
Naylor, *In re* 479
Neale *v.* Turton 274, 289, 545
Nedham's Case 173
Nelson, *Ex parte* 23
v. Lloyd 194
Nerot *v.* Burnand 400, 462, 506
Ness *v.* Angas 26, 162
Nestor, The Brig 569
Newall *v.* Hussey 486
Newberry *v.* Colvin 158
Newbiggin *v.* Pillans 24
Newbran *v.* Snider 51
New Draper, The 559, 560, 562
Newell *v.* Humphrey 444, 450
v. Hussey 567
v. Townsend 309
New Hampshire Mut. F. Ins. Co. *v.* Noyes 21
Newland *v.* Tate 160, 229, 394
Newman *v.* Baker 99
v. Bayley 449
v. Bean 60, 343, 352
v. Milner 308
v. Payne 517
Newmarch *v.* Clay 111, 427, 431, 432
Newsome *v.* Coles 134, 411, 419
Newton *v.* Belcher 434
New York Fire Ins. Co. *v.* Bennett 103, 212, 216
New York Life Ins. Co. *v.* Statham 27
Nicholls *v.* Dowding 194, 196
Nichols *v.* Angnera 65
v. Cheairs 64, 65, 111, 233
v. Hughes 175
Nicholson *v.* Ricketts 475
v. Janeway 222, 350
Nicoll *v.* Glennie 156
v. Mumford 12, 160, 167, 169, 547, 550, 552, 564
Niday *v.* Harvey 109
Niehoff *v.* Dudley 51
Nightingale *v.* Scammell 337
Nims *v.* Bigelow 278
Nisbet *v.* Patton 156
Niven *v.* Spickerman 275, 276, 285
Nixon *v.* Nash 481
Noble *v.* Bates 410
v. M'Clintock 112, 203
Nockels *v.* Crosby 271, 458, 467
Noel *v.* Bowman 273
Nokes, *Ex parte* 401
v. Leppings 517
Nolte, *Ex parte* 217, 485
Noonan *v.* McNab 234
v. Huddleston 511
Norfolk, *Ex parte* 290, 500
Norment *v.* Hull 59
v. Johnson 210
Norris *v.* Vernon 168
North *v.* Bloss 33
North British Bank *v.* Collins 232, 243
North Penn. Coal Co.'s Appeal 364
North River Bank *v.* Aymar 212
v. Stewart 349
Northwestern R. R. Co. *v.* M'Michael 21
Norton *v.* Seymour 126, 215
Norway *v.* Rowe 311, 314, 317, 458, 459
Norwich Nav. Co. *v.* Theobald 419
Nostra Signora de los Dolores 572
Notley, *Ex parte* 271, 275
Nott *v.* Downing 197, 413
Nourse *v.* Prime 516
Noyes *v.* Blakeman 25
v. Brumaux 195
v. Cushman 45
v. Sawyer 475
Nugent *v.* Locke 269, 457, 510
Nunnely *v.* Doherty 178
Nutting, *Ex parte* 497
v. Colt 59

O.

Oakeley *v.* Pasheller 110, 424, 488
Oakley *v.* Aspinwall 63, 142

O'Brien *v.* Currie 22
O'Conner *v.* Stark 512
Odiorne *v.* Lyford 323
v. Maxcy 196
Ogden *v.* Astor 49, 59, 442, 443, 447, 514, 516
v. Kip 310
v. Saunders 474
Ogilby, *Ex parte* 477
Ogilvy, *Ex parte* 477, 502
Ogle, *Ex parte* 500, 502
v. Barnes 157
v. Eagle Ins. Co. 549
v. Wrangham 570
Ohl *v.* Eagle Ins. Co. 550, 552
Olcott *v.* Wing 37
Oldaker *v.* Lavender 243, 296, 457, 513, 521
Oliphant *v.* Matthews 129, 130
Oliver *v.* Burton 334
v. Gray 87
v. Greene 549
v. Hamilton 312, 316, 317, 459
v. Palmer 475
Olmsted *v.* Hill 60
O'Mealey *v.* Wilson 28, 327
Onondaga Co. Bank *v.* De Puy 172
Ontario Bank *v.* Mumford 329
Ord *v.* Parbal 334
Ordinary *v.* Wherry 19
Orphan Board *v.* Van Reenen 516
Orr *v.* Churchill 251
Orvis *v.* Kimball 19
Osborn *v.* McBride 353
v. U. S. Bank 195
Osborne *v.* Brennan 46
v. Harper 272
Osgood *v.* Spenser 447
Osmond *v.* Fitzroy 513
Ostrom *v.* Jacobs 105, 195
Ottley *v.* Browne 10
Onston *v.* Hebden 561
Overholt's Appeal 364
Overton *v.* Tozer 179, 180
Oviatt *v.* Sage 555, 557
Owen *v.* Body 57, 146, 455
v. Bowen 485
v. Van Aster 214
Owens *v.* Collins 364, 365
v. Davis 548
v. Mackall 147
Owings *v.* Low 189, 193
Owston *v.* Ogle 233, 285, 548, 553, 558
Oxley, *Ex parte* 473
Oxnard *v.* Swanton 24
Ozeas *v.* Johnson 278, 280, 521

P.

Page *v.* Brant 291, 420
v. Carpenter 352, 359
Page *v.* Cox 159
v. Fry 336
v. McCrea 304
v. Wolcott 437
Pahlman *v.* Graves 481
Paine *v.* Thatcher 230, 276, 394
Palmer *v.* Dodge 388, 391
v. Elliot 63
v. Justice Assurance Soc. 180
v. Myers 164
v. Pinkham 124
v. Stephens 126, 128
v. Tyler 511
Park *v.* Ballentine 475
v. Wooten's Ex. 411
Parker, *Ex parte* 500
v. Barker 21, 123, 495
v. Brewer 194
v. Canfield 44
v. Cousins 111, 388, 391
v. Fergus 44, 67, 72
v. Gossage 247
v. Gregg 329
v. Jones 11
v. Jonté 516
v. Macomber 289, 326, 388, 389, 391
v. Merrill 192
v. Morrell 192
v. Muggridge 476, 483, 503
v. Phillips 390, 392
v. Pistor 270, 309, 343, 480
v. Ramsbottom 141, 479, 492
Parkhurst *v.* Kinsman 55, 265, 400
v. Muir 314
Parkin *v.* Carruthers 104, 411, 413, 414
v. Fry 545
Parnell *v.* Robinson 226
Parr, *Ex parte* 484, 489
Parry, *Ex parte* 493, 552, 554, 563, 564
Parsons *v.* Crosby 31, 66, 135, 292, 495
v. Haywood 234
Patch *v.* Wheatland 557
Paterson *v.* Gandasequi 565
Patten *v.* Garney 150, 337, 338
v. Whitehead 128
Patterson *v.* Blake 364
v. Brewster 37, 107, 349
v. Chalmers 548, 550, 551, 552, 553, 554, 565, 567, 570
v. Choate 189
v. Grace 363, 368
v. Maughan 178
v. Silliman 247
v. Ware 241
Pattison *v.* Blanchard 55, 89, 208
Patton *v.* Schooner Randolph 563, 564
Payne *v.* Hornby 388

Payne *v.* Ives 217
v. Matthews 349, 448, 503
Peacock *v.* Cummings 218
v. Peacock 135, 228, 258, 259, 260, 311, 314, 322, 381, 388, 399, 401, 404, 406
Peake, *Ex parte* 346, 351, 474, 480, 483, 492, 493
Pearce *v.* Chamberlain 12, 160, 438, 464
v. Covert 395
v. Hennessy 230
v. Kearney 108
v. Piper 545
v. Wilkins 97
v. Williams 490
Pearpoint *v.* Graham 163, 166, 381, 404
Pearsall *v.* McCartney 493
Pearson *v.* Keedy 345, 346
v. Lord 336
v. Parker 329, 344
v. Skelton 297, 563
v. Williams 251
Pease *v.* Hirst 187, 331, 334
Pechell *v.* Watson 338
Peck *v.* Fisher 364, 365, 372
v. Thomas 14
Pecker *v.* Hall 397
Pecks *v.* Ellis 287
Peele, *Ex parte* 149, 174, 175, 205
Peirsoll *v.* Elliott 308
Pellecat *v.* Angell 11
Pemberton *v.* Oakes 432, 452, 523
Penn *v.* Stone 326, 354
v. Whitehead 25
Pennell *v.* Defell 432
Penniman *v.* Munson 55, 265
Penn. Ins. Co. *v.* Murphy 543
Penn. & Reading R. R. Co. *v.* Derby 572
Penny *v.* Black 261
v. Martin 65, 109
Pennypacker *v.* Umberger 426
People *v.* Norton 316
Peoria M. & F. Ins. Co. *v.* Hall 557
Perens *v.* Johnson 385, 393, 400
Perham *v.* Raynal 185, 186
Perkins *v.* Hart 517
Perminter *v.* Kelly 323
Perrin *v.* Keene 391
Perrine *v.* Hankinson 144
Perring *v.* Hare 480, 545
v. Hone 126, 215, 541
Perrott *v.* Bryant 76
Perry *v.* Butt 81, 210
v. Jackson 182
v. Randolph 66, 132
Person *v.* Carter 178, 181
Peter *v.* Beverley 486
Peters *v.* Anderson 427
v. Davis 440, 447
v. Sandford 65, 108
Petrie *v.* Bury 333
Petrikin *v.* Collier 39, 384
Pettee *v.* Appleton 44, 78
v. Hannay 9
v. Lamont 152
Pettes *v.* Atkins 44
Pettit *v.* Shepherd 308
Pettyt *v.* Jameson 242, 302, 519
Peyroux *v.* Howard 569
Pfeffer *v.* Steiner 447
Phebe, The 572
Phelps *v.* Brewer 174
Philips *v.* Atkinson 319, 442
v. Belden 516
v. Ledley 568
v. Turner 229, 230, 394, 522
Phillips *v.* Clagett 182, 325
v. Cook 310, 353, 359
v. Pennywit 335
v. Phillips 364, 366, 374, 375
v. Purington 194, 548, 551
Philson *v.* Bampfield 65
Phinsen *v.* Negley 202
Phœnix *v.* Ingraham 493
Piatt *v.* Williams 163
Pickard *v.* Sears 494
Pickering *v.* Holt 179
v. Pickering 337
v. Rugby 312
Pierce *v.* Barnham 24
v. Bryant 532, 538
v. Cameron 110
v. Covert 372
v. Daniels 223, 224
v. Fuller 410
v. Jackson 152, 167, 202, 352, 353, 449, 481
v. Kearney 65
v. Pass 112, 113, 210
v. Stockwell 175
v. Tiernan 167, 503
v. Tobey 19
v. Trigg 364, 372, 373, 446
v. Whitley 12
Pierson *v.* Hooker 163, 173, 182, 325
Pigott *v.* Bagley 452, 453, 512
Pike *v.* Bacon 180, 183
v. Warren 188
Pillans *v.* Harkness 13, 296
Pilling *v.* Pilling 230
Pim *v.* Harris 230
Pinckney *v.* Hall 1, 199
v. Keyler 104
v. Wallace 441
Pine, *Ex parte* 500
Pinkerton, *Ex parte* 348
Pinkett *v.* Wright 545, 547
Pipe *v.* Bateman 544
Piper *v.* Smith 373
Pirtle *v.* Penn 301
Pit *v.* Cholmondeley 517
Pitcher *v.* Barrows 12, 326, 412, 418, 419

Pitkin *v.* Pitkin 454
Pitt *v.* Petway 323
v. Smith 29
Pitts *v.* Mower 335
v. Waugh 65, 362, 363, 368, 369
Place *v.* Sweetzer 310, 343
Planche *v.* Fletcher 11
Platt *v.* Halen 334
Plowden, *Ex parte* 478
Poindexter *v.* Waddy 203, 434
Pollard *v.* Stanton 42
Pollock *v.* Williams 99
Pomeroy *v.* Benton 513
Pond *v.* Clark 230
v. Kimball 494
Pontet *v.* Basingstoke Canal Co. 546
Ponton *v.* Dunn 452
Pool *v.* Delaney 271, 272, 274
v. Pratt 18
Poor *v.* Carleton 311
Pope *v.* Cole 448
v. Randolph 281, 283
v. Risley 193, 412, 419
v. Salsman 511
Popper *v.* Scheider 459
Porter *v.* Cumings 200, 214
v. M'Clure 45, 47, 551
v. Taylor 173, 325, 396
v. Wheeler 394
Porthouse *v.* Parker 196
Portland Bank *v.* Hyde 288, 290, 325
v. Stubbs 571
Posey *v.* Bullitt 178
Post *v.* Kimberly 39, 45, 99, 117, 256
Postmaster-General *v.* Furbur 432
Potomac, The Ship 227
Pott, *Ex parte* 497
v. Eyton 42, 77, 89, 120
Potter *v.* Gray 381, 383
v. McCoy 111, 180
v. Moses 56, 59
Potts *v.* Bell 27
v. Waugh 37
Powell *v.* Layton 157, 158
v. Messer 202, 203
v. North 455
v. Waters 196, 420
Pozzi *v.* Shipton 158
Pratt *v.* Hutchinson 546, 547
v. Langdon 63, 67
v. Oliver 241
v. Reed 569
v. Tunno 568
Prentiss *v.* Savage 474
v. Sinclair 411, 412, 413
Prescott, *Ex parte* 489
President, The Brig 568
Preston *v.* Strutton 274, 278, 282, 283
Price *v.* Alexander 59, 181, 183
v. Green 251
v. Groom 57, 146
v. Hicks 365
Prince *v.* Crawford 99
Princeton & K. Turnpike Co. *v.* Gulick 411, 413
Pritchard *v.* Draper 173, 187, 188, 192, 195, 396
Pritt *v.* Clay 516
Proctor *v.* Moore 474
v. Sargent 410
Protheroe *v.* Forman 309
Pruyn *v.* Milwaukie 230
Pugh *v.* Currie 364, 365, 368, 373, 376
Pullen *v.* Ready 513
Purcell *v.* Cole 515
Purdy *v.* Powers 211, 293, 295
Pursley *v.* Ramsey 128, 411
Purviance *v.* M'Clintee 80
v. Sutherland 181, 183
Putnam *v.* Wise 42, 45, 144, 160, 546, 557

Q.

Queen *v.* Whitmarsh 43
Quinbran *v.* English 409
Quine *v.* Quine 36, 55
Quiner *v.* Marblehead Social Ins. Co. 163

R.

Raba *v.* Ryland 165
Rackstraw *v.* Imber 280, 281, 520
Radcliffe, Executors of, *v.* Wightman 514
Radenhurst *v.* Bates 276, 330
Rainey *v.* Nunse 481
Rains *v.* McNairy 323
Raleigh, *Ex parte* 62
Ramey *v.* McBride 210
Ramsbottom *v.* Duck 477
v. Parker 237
Randall *v.* Randall 370
Randel *v.* Chesapeake, &c. Canal Co. 248
Randleson, *Ex parte* 10, 433
Randolph *v.* Randolph 514
Ransom *v.* Van Deventer 477
Rapid, The 27, 327
Rapp *v.* Latham 152
Raw *v.* Pole 494
v. Potts 494
Rawlinson *v.* Clarke 58
Rawson, *Ex parte* 502
Rawstone *v.* Gandell 325, 329
Ray *v.* Bogart 514
Rayburn *v.* Day 567
Raymond *v.* Cause 297
v. Putnam 250
Raymond's Case 53, 159, 168
Rayner *v.* Pearsall 514
Read *v.* Bowers 311
v. White 485, 488

Reade *v.* Bentley 381, 383, 384
Reber *v.* Columbus Mach. Man. Co. 116
Redman *v.* Green 516
Reece *v.* Hoyt 462
Reed *v.* Boardman 427
v. Hussey 81
v. Murphy 85
v. Norris 505
v. Upton 486, 567
v. White 111, 397, 423, 485, 488, 566, 567
Reese *v.* Bradford 345, 346, 351
Reeve, *Ex parte* 492, 500, 502
v. Davis 552, 553, 569
Reeves *v.* Ayres 480
Regden *v.* Pierce 505, 506, 525
Regina *v.* Mallinson 322
v. Registrar of Joint-stock Companies 542
v. Whitmarsh 542
Reid, *Ex parte* 478, 500, 501
v. Hollinshead 47, 50, 56, 169
Reilly *v.* Smith 412
Reimsdyk *v.* Kane 192, 194, 196, 200
Remick *v.* Emig 440
Remington *v.* Allen 67
v. Cummings 179
Renfrew *v.* Pearce 113
Renton *v.* Chaplain 312, 319, 400, 462
Reppert *v.* Colvin 190
Reuben *v.* Cohen 201
Revens *v.* Davis 548, 553
Rew *v.* Pettet 187
Rex *v.* Almon 156
v. Cole 22
v. Collector of the Customs 548
v. Inhabitants of Hardwick 196
v. Marsh 156
v. Pearce 156
v. Philip 548
v. Topham 156
v. Webb 546, 547
Reybold *v.* Dodd 229, 394
Reynard *v.* Chase 17
Reynolds *v.* Cleveland 39, 63, 99, 106
v. Hicks 86, 159
v. Mardis 230
v. Toppan 82, 84, 85, 91, 144, 572
v. Ward 424
Rhea *v.* Rhenner 24
Rice *v.* Austin 81, 84, 144, 145, 343, 353
v. Barnard 372
v. Barrett 116
v. Shuman 7
v. Shute 475
Rich *v.* Coe 553
v. Davis 212
v. Pikinton 157
Richards *v.* Beauman 459
v. Daveis 299, 300, 312, 459, 512
Richards *v.* Dutch 475
v. Heather 447
Richardson, *Ex parte* 454, 455, 505
In re 494, 501
v. Bank of England 241, 269, 518
v. Boright 19, 21
v. Farmer 62
v. French 155
v. Hastings 459, 512
v. Hogg 532, 533
v. Larpent 394
v. Maine Ins. Co. 11
v. Moies 391
v. Tobey 472
v. Wyatt 376
v. Wyman 488
Richmond *v.* Heapy 174, 211
Richmond Turnpike Co. *v.* Vanderbilt 572
Richter *v.* Poppenhusen 147
Ricketts *v.* Bennett 99
Rider *v.* Wilcox 67
Ridgeley *v.* Crandall 18
v. Carey 168, 503
Ridgway *v.* Clare 343, 349, 448
v. Grant 275, 276
v. Philip 123, 132, 195, 196
Ridgway's Appeal 366, 378
Ridley *v.* Plymouth, &c. Grinding and Baking Co. 543
v. Taylor 111, 112, 199, 203, 204, 206, 208
Rigden *v.* Pierce 446, 473, 507, 511, 525
Ripley *v.* Colby 39, 52, 125
v. Waterworth 370
Roach *v.* Perry 36, 229, 261
Roache *v.* Pendergrast 272
Robb *v.* Mudge 411, 487, 488
Robbins *v.* Butler 541
v. Cutler 18
v. Eaton 19
v. Fuller 386
v. Laswell 86
v. Willard 194
Robert *v.* Garnie 427
Roberts *v.* Anderson 311
v. Everhardt 36, 312, 313, 315, 317
v. Fitler 271, 287
v. Hardy 28, 327
v. Johnson 152, 156
v. Kuffin 517
v. McCarty 366, 372
v. Spencer 413
v. Totten 156, 224, 242
Robertson *v.* Lockie 465
v. Mills 203, 212
v. Smith 23, 65
Robey *v.* Howard 39, 526
Robinson, *Ex parte* 502
In re 477

Robinson *v.* Anderson 249
v. Crowder 166, 183
v. Gleadow 557, 562, 570
v. Hofman 175
v. Mansfield 337
v. Marchant 339
v. McDonnell 496
v. McIntosh 166, 236, 271, 533, 538
v. Reynolds 24
v. Rudkins 106
v. Taylor 391
v. Thompson 218
v. Wilkinson 64, 291, 397
v. Williams 282
Robson *v.* Curtis 273, 283
v. Drummond 291, 333, 334, 335
Rockwell *v.* Wilder 271, 272, 274, 279, 284
Rodgers *v.* Maw 395
v. Meranda 349
v. Nowill 265
Rodney *v.* Hare 517
Rodriguez *v.* Heffernan 160, 164, 167, 169, 343, 547
Rodwell *v.* Redge 291, 334
Rogers *v.* Batchelor 112, 113, 163, 164, 168, 175, 203, 205, 209
v. Coit 126, 213
v. Hurd 18
v. Imbleton 157
v. Nichols 346, 351, 462
v. Reed 380
v. Rogers 269, 288, 325
Rolfe *v.* Peterson 251
v. Rolfe 298
Rolleston *v.* Hibbert 550
Rollins *v.* Stevens 216
Rolston *v.* Click 216
Romp, The 171
Roosevelt *v.* Mark 188
Rootes *v.* Walford 193, 387
Rooth *v.* Quin 97, 195, 397, 411
Rose *v.* Daniel 21
v. Marchie 292
v. Poulton 290
Ross *v.* Decy 64, 291
v. Drinker 59
v. Henderson 343
v. Howell 175, 180
v. Lawhorn 108
v. Parkyns 67
Rothwell *v.* Dewees 471
v. Humphreys 105, 172
Routh *v.* Thompson 557, 570
Rowe *v.* Wood 223, 228, 509
Rowland, *In re* 469
v. Booser 363
v. Long 78
Rowlandson, *Ex parte* 50, 68, 74, 345, 474, 490, 493, 496, 499
Rowley *v.* Adams 258
Rowley *v.* Stoddard 173
Rowth *v.* Howell 455
Roxby, *Ex parte* 148, 149, 488
Roys *v.* Vilas 440, 441
Ruddock's Case 182
Ruffin, *Ex parte* 167, 168, 344, 345, 346, 350, 351, 442, 469, 474, 481, 493, 497, 502
Ruffner *v.* McConnel 183
Rufford, *Ex parte* 489
Russell *v.* Annable 178, 183
v. Austwick 225
v. Grimes 284
v. Leland 53
v. Loscombe 511
v. Miller 365
v. Pellegrini 177, 247
v. Perkins 333
v. Swan 328, 329, 330
Rutledge *v.* Squires 112
Rutter *v.* Tallis 314
Ryan *v.* Mackmath 308

S.

St. Barbe, *Ex parte* 480, 501
St. Jago de Cuba, The 569
St. James Club, *In re* 43
St. John *v.* Holmes 179
v. Standring 323
St. Johns, *Ex parte* 480
Sadler, *Ex parte* 482
v. Lee 155, 172, 464
Sainter *v.* Ferguson 251
Sale *v.* Dishman 110
Salmon *v.* Davis 182, 325
Salomons *v.* Nissen 39, 51, 164, 324, 473
Salter *v.* Ham 59, 508
Saltmarsh *v.* Bower 172
Saltoun *v.* Houston 437
Sampson *v.* Shaw 341
Sanborn *v.* Merrill 323
Sander *v.* Sander 465
Sanderson *v.* Brooksbank 212
v. Stockdale 481
Sandham, *Ex parte* 435
Sandilands *v.* Marsh 172, 217, 232
Sanford *v.* Mickles 193, 391
Sangster *v.* Mazarredo 195
San Jose Indiano, The 27, 261
San Juan Baptista, The 572
Saunders *v.* Johnson 243, 275
Sauthoff, *In re* 494
Savage, *In re* 469
v. Carter 364
v. Marsh 474
v. Putnam 439
v. Rockwell 409
Saville *v.* Robertson 62, 104, 105, 114, 117, 118, 148, 215, 256, 436
Saving and Loan Society *v.* Gibb 443

Sawyer *v.* Freeman 553, 554, 570
v. Proctor 283
Sayer *v.* Bennett 455, 463, 464
Sayre *v.* Frick 40
Scaife *v.* Jackson 486
Scales *v.* Jacob 186, 190
Schack *v.* Autor 333
Schemerhorn *v.* Loines 554, 565, 566, 567
Schmertz *v.* Shreever 178, 183
Schoeffling *v.* Schwarting 46
Scholefield *v.* Eichelberger 27, 159, 407, 438
v. Heafield 447
Scholey *v.* Walton 451
Schollenberger *v.* Seldonbridge 213, 526
Schulten *v.* Lord 535, 537
Schunbacker *v.* Riddle 152
Scotlin *v.* Stanley 565
Scott *v.* Avery 177, 248
v. Beale 434
v. Berkeley 545
v. Buchanan 18, 21
v. Campbell 85, 87, 271, 272
v. Colmesnil 65, 80, 415
v. Dansley 128
v. Fisher 427
v. Godwin 333
v. Milne 447, 516
v. Rayment 237
Scottin *v.* Stanley 554, 566
Scruggs *v.* Blair 365
v. Russell 7
Seabrook *v.* Rose 548, 552, 563
Sea, Fire, and Life Ass. Co., *In re* 543
Searight *v.* Craighead 190
Searle *v.* Adams 230
Secor *v.* Killer 292
Sedam *v.* Williams 65, 109
Seddon, *Ex parte* 148, 149, 486, 488
v. Connel 287
Sedgwick *v.* Daniell 273, 287
See Reuter, The 562
Seighortner *v.* Weissenborn 459
Seldon *v.* Hickock 323, 556
Sellers *v.* Streator 180
Sells *v.* Hubbell 295
Sergeant, *Ex parte* 287
Servant *v.* Rusk 494
Servante *v.* James 233
Sessions *v.* Jones 308
v. Richmond 251
Settembre *v.* Putnam 547
Sewall *v.* Catlin 337, 338
Sewel *v.* Bridge 517
Sexton *v.* Sexton 225
Shackle *v.* Baker 262, 263
Shaffer *v.* Snyder 418
Shakeshaft, Stirrup, & Salisbury, Case of 480, 499, 501
Shaler *v.* Trowbridge 210
Shamburg *v.* Ruggles 435
Sharon Canal Co. *v.* Fulton Bank 17, 29
Sharp *v.* Taylor 10, 11, 287
v. Warren 277
Sharpe *v.* Cummins 258
Shaw, *Ex parte* 174
v. Holland 542
v. Picton 427, 428
v. Pratt 173
v. Rhodes 319
v. Robbins 475
Shearer *v.* Paine 376
v. Shearer 365, 372
Shed *v.* Pierce 173
Sheehy *v.* Mandeville 65, 110, 423, 424, 486, 487
Sheldon *v.* Sheldon 194, 346
Shelton *v.* Cocke 188, 189
v. Pollock 178
Shenkl *v.* Dana 230
Shepard *v.* Hawley 40, 197
v. Pratt 67
Shepherd, *Ex parte* 489
v. Morris 516
v. Oxenford 317
v. Towgood 505
Shepley *v.* Waterhouse 188
Sheridan *v.* Medara 142
Sherman *v.* Kreul 448
Sherwood *v.* Barton 211
v. Hall 572
v. Marwick 152
v. St. Paul, &c. 7, 364
Shields *v.* Oney 291
Shirley *v.* Long 471
Shirreff *v.* Wilkes 111, 205, 207, 434
Shoemaker *v.* Benedict 190
Shott *v.* Strealfield 119, 131
Shotwell *v.* Miller 173
Shropshire *v.* Shepherd 33, 85
Shumway *v.* Reed 486, 567
Shurlds *v.* Tilson 412, 413
Shute *v.* Taylor 252
Sibley *v.* Lambert 190
Siegel *v.* Chidsey 104, 469, 470
Siffkin *v.* Walker 105, 213, 334
Sigourney *v.* Drury 188, 190
v. Munn 364, 441, 446, 525
Sikes *v.* Work 279, 284
Silk *v.* Osborn 445
v. Prime 449
Sillitoe, *Ex parte* 480, 499, 500, 501
Simmons *v.* Curtis 166
v. Leonard 446, 525
v. Swaine 468
Simms *v.* Kirtley 522
Simonds *v.* Strong 413
Simpson, *Ex parte* 484, 496
v. Bloss 10
v. Feltz 42, 56, 443, 524
v. Geddes 189, 192
v. Howden 308
v. Leach 373

Simrall *v.* O'Bannons 326
Sims *v.* Bond 292, 334, 563
v. Brittain 334, 569, 570
v. Brutton 100, 151
v. Smith 103
v. Willing 46
Simson *v.* Cooke 333, 432
v. Ingham 427, 428, 430, 432
Singer *v.* Kelly 533, 535
Sisters, The 550, 559
Sitler *v.* Walker 310
Skaife *v.* Jackson 211
Skilling *v.* Coolidge 176
Skinner *v.* Dayton 178, 180, 181, 381, 404, 510, 543, 544
v. Stocks 291, 334, 335, 501
v. Tinker 401
Skipp *v.* Harwood 168, 309, 321, 400, 461
Skipworth *v.* Lea 440
Skirving *v.* Williams 456
Skrine *v.* Sloop Hope 559, 561
Slater, *Ex parte* 173, 488
v. Lawson 187, 451
v. Willis 556
Slee *v.* Bloom 513
Sleech's Case 448, 476, 485
Slemmer's Appeal 459
Sloan *v.* Moore 313
Slocum *v.* Hooker 23
Sloo *v.* State Bank of Illinois 178, 179
Small *v.* Atwood 340
v. Fitzwilliams 251
Smith, *Ex parte* 254, 343, 359, 469, 470, 478, 489, 491, 492, 494, 496, 497, 500
Matter of 310, 480
v. Allen 268
v. Argall 532, 538, 539
v. Bailey 172, 199, 214
v. Barrow 269, 275, 277
v. Black 65, 109
v. Burnham 7, 37, 65, 368
v. Chandos 238
v. Clay 575
v. Coleman 100, 205
v. Collins 35
v. Craven 105, 118
v. Cummings 311
v. Danvers 320
v. Darker 343
v. De Silva 167, 469, 503, 570
v. Edwards 147, 346, 351
v. Emerson 350
v. Fromont 303
v. Goldsworthy 543
v. Hill 36
v. Hull Glass Co. 543, 544
v. Jackson 343, 373
v. Jameson 155, 232, 395, 427
v. Jarves 199
v. Jeyes 234, 312, 314, 381, 459
v. Johnson 345
Smith *v.* Jones 37, 65, 363
v. Kane 483
v. Kerr 181
v. Knight 44
v. Lowe 315
v. Ludlow 188, 189
v. Lusher 98, 199, 212, 233, 289
v. Mallory's Ex'r 449
v. Mayo 18, 19
v. Moynahan 44
v. Oriell 324, 461, 471, 472, 473, 474
ads. Perry 86
v. Rogers 111, 425, 485
v. Sheldon 392
v. Sherwood 134
v. Sloane 99
v. Smith 63, 132, 254, 270, 365, 475, 486
v. Stokes 324, 461, 469, 471, 472, 473, 480
v. Stone 182, 325
v. Sumner 44
v. Tarlton 7, 8
v. Tupper 179
v. Tustin 326
v. Vanderberg 67, 99
v. Watson 50, 145, 495
v. Wigley 430, 432
v. Winter 180, 386, 392
v. Wright 44, 56
Smitha *v.* Cureton 196
Smout *v.* Ilbery 397
Smyth *v.* Harrie 395
v. Hawthorn 447
v. Strader 212
Smythe *v.* Smythe 311
v. Tankersley 323
Snaith *v.* Burridge 111, 153, 165, 209
Snead *v.* Barringer 106
Sneed *v.* Coyle 212
v. Wiester 427, 430
Snell *v.* Deland 72
Sniffer *v.* Sass 480
Snodgrass *v.* Broadwell 329
Snow *v.* Howard 214
Snyder *v.* May 179
v. Webb 25
Solly *v.* Forbes 173, 333
Solomon *v.* Solomon 39, 224, 238
Somerby *v.* Buntin 44
Somerville *v.* Mackay 244, 299
Sophie, The 568
Soules *v.* Burton 227
Southard *v.* Steele 178
South Carolina Bank *v.* Case 128, 129, 200, 213, 233
Southwick *v.* McGowan 12
Spalding *v.* Hedges 117
Sparhawk *v.* Russell 449
Sparrow *v.* Chisman 174, 211
Spaulding *v.* Ludlow Woollen Mill 190, 411

Speake *v.* Brewitton 292, 329
Spear *v.* Gillet 108, 109
v. Newell 270, 281, 282
Speer *v.* Bishop 397
Speights *v.* Peters 314, 316
Spenceley *v.* Greenwood 397
Spencer *v.* Billing 121, 495
v. Durant 243, 275
Sperry, *Ex parte* 349
Spicer *v.* James 264
Spiers *v.* Houston 332
Sprague, *Ex parte* 497
v. Ainsworth 213
Springer *v.* Foster 475
Spury, *In re* 345
Staats *v.* Howlett 214, 263
Stables *v.* Eley 414
Stackpole *v.* Davoren 515
Stacy *v.* Devy 335
Stall *v.* Catskill Bank 216
Stannard *v.* Whittlesey 510
Stansfield *v.* Levy 291
Stanton Iron Works, *In re* 139
Stanwood *v.* Owen 397
Stapilton *v.* Stapilton 513
Stark *v.* Taylor 24
Starnes *v.* Quin 323
State *v.* Bierman 151
v. Catskill Bank 205
v. Neal 151
State Rights, The 572
Stead *v.* Salt 176, 177, 182
Steamboat Orleans *v.* Phœbus 555, 559, 561
Stearns *v.* Barrett 410
v. Burnham 203, 204
v. Haven 59, 66, 132
v. Houghton 201
Stebbins, *Ex parte* 345
Stegall *v* Coney 210
Steel *v.* Jennings 172, 175, 190
v. Western 292
Steele *v.* Stuart 52
Steers *v.* Lashley 10
Steiglitz *v.* Egginton 179, 180
Stein *v.* Robertson 241, 261, 296
v. La Dow 166
Stephens *v.* Reynolds 201
v. Orman 224, 514
v. Thompson 423, 424
Sterling *v.* Hanson 552, 564
v. Jaudon 103
Sternberg *v.* Callaman 112, 434
Sterndale *v.* Hankinson 432
Sterry *v.* Clifton 17, 38
Stevens *v.* Denning 333
v. Faucet 86
v. Lunt 330, 334
v. Morse 394
v. Yeatman 394
v. Perry 349
Stevenson *v.* Mathers 511
Steward *v.* Blakeway 365, 371
Stewart *v.* Brown 494
v. Forbes 259, 260
v. Hall 565, 566
v. Levy 150
v. Rogers 435
Stileman *v.* Ashdown 516
Stimson *v.* Lewis 545
Stinson *v.* Wyman 572
Stoallings *v.* Baker 44
Stockdale *v.* Ullery 201
Stocken *v.* Dawson 231, 443, 451
Stocker *v.* Brockelbank 59, 68
Stockton *v.* Frey 156, 157
Stockwell *v.* Dillingham 103
Stokes *v.* Brown 21
Stone *v.* Chamberlin 110, 391
v. Dennis 248, 249
v. Fouse 457, 510
v. Ketland 572
v. Marsh 153, 154
v. Seymour 724
Storer *v.* Flack 8
v. Hinkley 200
v. Hunter 496
Storrs *v.* Barker 494, 495
Story *v.* Livingstone 475
v. Lord Winsor 36
v. Moon 459
Stouffer *v.* Coleman 471
Stoughton *v.* Lynch 224, 242, 447, 513, 516, 517, 522, 523
Stout *v.* Fortune 345, 346, 351
Stoveld, *Ex parte* 317
v. Eade 431
Strain *v.* Wright 18
Strange *v.* Lee 332, 333
Strangford *v.* Green 178
Street *v.* Rigby 248, 249, 468
Strelly *v.* Winson 557, 559, 562
Strong *v.* Fish 210
v. Foster 424
Stroud, *Ex parte* 480, 502
Struthers *v.* Pearce 225
Stuart *v.* Corning 267
v. Kirkwall 25
Studdy *v.* Sanders 195
Styles *v.* Cowper 494
Succession of Andrew 470
Sullivan *v.* Greaves 10, 287
Sumner *v.* Hampson 167, 372, 374, 376, 503
v. Powell 348
Sutcliffe *v.* Dohoman 343
Sutton *v.* Back 550
v. Clarke 157
v. Gregory 199, 212
v. Irwine 217
Suydam *v.* Barber 108
v. Owen 440
Swallow, Steamboat 55
Swan *v.* Stedman 181
v. Steele 52, 62, 121, 131, 163, 172, 175, 182, 199, 201

Swasey *v.* Antrim 25
v. Vanderheyden 18
Sweet *v.* Bradley 217
v. Jacocks 505
Sweetser *v.* French 216, 217
Sweetzer *v.* Mead 164, 183
Sylvester *v.* Smith 104, 290
Symonds *v.* Canter 339

T.

Taber *v.* Cannon 566
Taft *v.* Buffum 400
v. Sergeant 18, 19
Taggard *v.* Loring 82, 144, 549, 550
Taitt, *Ex parte* 483, 484
Talbot *v.* Commanders of Three Brigs 572
Tallmadge *v.* Penoyer 208
Tams *v.* Hitner 126
Tanner *v.* Hall 209, 216
Tapley *v.* Butterfield 163, 164, 166, 172, 183
Tappan *v.* Bailey 545
v. Blaisdell 343, 352, 449
v. Kimball 196
v. Poor 474
Tassey *v.* Church 289
Tatam *v.* Williams 547
Tate *v.* Mut. Fire Ins. Co. 329
Tatlock *v.* Harris 396
Tattersall *v.* Groote 13, 248, 296, 457
Tay *v.* Ladd 437
Tayloe *v.* Sandiford 427
Taylor, Case of 178
Ex parte 477, 484, 496, 502
v. Bemis 265
v. Carpenter 265
v. Castle 438
v. Church 337, 338, 339
v. Coryell 174, 178
v. Davies 459
v. Fields 3, 167, 309, 442, 480, 481, 506
v. Glassbrook 17
v. Hamlin 516
v. Hayling 516
v. Henderson 133, 194
v. Herring 52
v. Higgins 287
v. Hillyer 203, 204
v. Jones 151, 516
v. Kymer 431, 433
v. Perkins 60, 147
v. Taylor 261
v. Terme 80
v. Young 413
Teague *v.* Hubbard 274, 289, 545
Teed *v.* Baring 566, 567
v. Elworthy 23, 135, 292
Telford *v.* Ramsey 103, 128
Teller *v.* Muir 194
Temple *v.* Seaver 32, 390
Tench *v.* Roberts 56, 59, 76
Tennat *v.* Elliott 287
Tenney *v.* Johnson 481
v. N. E. Protective Union 541
Terrell *v.* Goddard 316, 394
v. Richards 7, 275
Terry *v.* Butler 481
Texiere *v.* Da Costa 314
Thacher *v.* Dinsmore 567
Thames, The 572
Thayer *v.* Buffum 289, 326
v. Lane 372, 374
v. Smith 202
Thicknesse *v.* Bromilow 99, 172, 175, 200
Thimblethorp *v.* Hardesty 243, 275
Thom *v.* Thom 369
Thomas, *Ex parte* 496
v. Elmaker 545
v. Fredericks 248
v. Harding 175
v. Lichfield 295
v. Penrick 103
v. Pyke 275
v. Shillibeer 110, 397, 422
Thomason *v.* Frere 178, 469, 474, 475
Thomasson *v.* Boyd 19
Thompson *v.* Andrews 454
v. Bowman 316
v. Brown 430, 455, 456, 505
v. Charnock 288
v. Cook 555, 556
v. Davenport 565, 566
v. Finden 266, 554, 566
v. Graham 308
v. Howard 36, 100
v. Ketchum 328
v. Lay 19
v. Leake 556
v. Percival 110, 397, 422 423, 426, 485, 487, 488
v. Ryan 258, 504
v. Snow 82, 144
v. Steamboat J. D. Morton 290
v. Wesleyan Newspaper Association 544
v. Williamson 258, 260
Thomson *v.* Cook 323
v. Thomson 287
Thorn *v.* Hicks 550
v. Smith 105
Thorndike *v.* De Wolf 46, 145, 548, 551, 554, 563, 564
Thornton *v.* Dixon 438
v. Illingworth 18, 23
v. Kerr 133
v. Proctor 229, 230, 394
Thorpe, *Ex parte* 111, 112, 113, 205
v. Jackson 348, 417, 448
Thrall *v.* Seward 338, 434
Thrupp *v.* Fielder 19

Thurber *v.* Corbin 421
Thurlow *v.* Gilmore 19
Thursby *v.* Lidgerwood 388
Thurston *v.* Blanchard 567
v. Lloyd 202
Thwaites *v.* Richardson 196
Thweatt *v.* Jones 287
Tibbatts *v.* Tibbatts 56, 144
Tickel *v.* Short 520
Till's Case 494
Tilley *v.* Phelps 343
Tillier *v.* Whitehead 175, 233
Tillinghast *v.* Champlin 347, 364, 372, 378
v. Nourse 190
Tillotson *v.* Tillotson 365, 441
Tilson *v.* Warwick Gas Light Co. 545
Tindal *v.* Bright 289, 325
Tinkler *v.* Walpole 194
Tipton *v.* Nance 328
Tirrell *v.* Jones 230
Tobias *v.* Blin 85
Todd *v.* Clapp 25
Tom *v.* Goodrich 107, 179
Tombeckbee Bank *v.* Dumell 391, 411
Tomkins *v.* Woodford 201
Tomlin *v.* Lawrence 173, 174
Tooker's Case 182
Toplift *v.* Jackson 273, 386
Torrell, *Ex parte* 502
Torrey *v.* Buck 308
Toulmin *v.* Copland 432, 518, 521, 523
Towle *v.* Harrington 329
Town *v.* Hendee 146
Townsend *v.* Bogart 151
v. Goewey 271, 280
v. Neale 37
v. Riddle 424
v. Townsend 515
Townshend, *Ex parte* 517
v. Devaynes 264
Tracy *v.* Pearl 111
Traders' Bank of Rochester *v.* Bradner 208
Tradesman's Bank *v.* Astor 233
Trafton *v.* United States 108
Trait *v.* Baird 276
Travis *v.* Milne 260
Treadwell *v.* Williams 164, 377
v. Brown 359
Tredwen *v.* Bourne 99
Tribune, The 572
Trimble *v.* Coons 178, 179, 180
Troughton *v.* Hunter 417, 459
Troup *v.* Haight 516
Troy Factory *v.* Corning 407
Troy Ins. Co. *v.* Winslow 448
Trueman, *Ex parte* 521
v. Loder 129
Tubbs *v.* Richardson 323
Tucker *v.* Bradley 146
v. Buffington 571
Tucker *v.* Moreland 18
v. Oxly 449
v. Peaslee 105
Tuckerman *v.* Newhall 173
Tudor *v.* White 413
Tumlin *v.* Goldsmith 12
Tunno *v.* The Betsina 561
Tupper *v.* Haythorne 165
Turbeville *v.* Ryan 181
Turner, *Ex parte* 492
v. Bissell 84, 89, 91
v. Burrows 335, 336, 569, 570
v. Ross 188
v. Smart 186
Turnipseed *v.* Goodwin 241, 261, 463
Tutt *v.* Adams 202, 203
v. Lund 230
Tuttie *v.* Cooper 23, 133, 158, 194, 475
v. Eskridge 178, 181
Twiss *v.* Massey 493
Twopenny *v.* Young 333
Twyford *v.* Trail 155
Tyler *v.* Taylor 323
v. Scott 44
Tyng *v.* Thayer 509, 523
Tyrrell *v.* Washburn 544
Tyson *v.* Pollock 172

U.

Uhler *v.* Browning 202
v. Semple 372
Ulling *v.* Gimrick 99
Ulmer *v.* Cunningham 334
Union Bank *v.* Eaton 105, 201
v. Hall 387
v. Knapp 516
United Ins. Co. *v.* Scott 46, 57, 568
United States *v.* Astley 107, 178, 179, 182
v. Bainbridge 18
v. Bradbury 432
v. Cushman 65, 108
v. Hack 343
v. Kirkpatrick 428, 432
v. Lyman 107
v. Thomason 156
v. Thompson 173
v. Wardwell 432
United States Bank *v.* Binney 30, 38, 129, 130, 239, 401, 446, 522
United States Express Co. *v.* Bedbury 267
Univ. of Cambridge *v.* Baldwin 333
Universities of Oxford and Cambridge *v.* Richardson 243
Updyke *v.* Doyle 434
Upham *v.* Hewett 44
v. Naylor 360
Usborne, *Ex parte* 497
Usher *v.* Dauncey 212

V.

Valentine *v.* Ford 24
Valiant, The 561
Vallett *v.* Parker 200, 202, 212
Van Alstyne *v.* Cook 535
Van Amringe *v.* Ellmaker 278, 280, 283, 510
Vance *v.* Blair 237
v. Campbell 100
Vanderburgh *v.* Hull 42, 85, 91
Van Deusen *v.* Blum 178, 180
Van Epps *v.* Van Deusen 483
Van Eps *v.* Dillage 110
Vanheath *v.* Turner 1
Van Keuren *v.* Parmelee 170, 190, 192
Vann *v.* Barnett 518
Van Ness *v.* Forrest 65, 274, 283
Van Ostrand *v.* Reed 486
Van Reimsdyk *v.* Kane 195
Van Sandau *v.* Moore 236, 401, 403, 405, 512
Van Scoter *v.* Lefferts 167
Van Valen *v.* Russell 65
Van Valkenburgh *v.* Bradley 391
Van Winkle *v.* Ketchum 18
Varnor *v.* Nobleborough 486, 567
Vassar *v.* Camp 14, 57
Venning *v.* Leckie 275, 276
Vent *v.* Osgood 18
Venus, The 327
Vere, *Ex parte* 473
v. Ashby 14, 64, 201, 436
Vermillion *v.* Bailey 511
Vernon *v.* Jefferys 333, 475
v. Manhattan Co. 212, 412, 415, 419
v. Vawdry 513, 515, 516
Vesey *v.* Mantell 275
Vez *v.* Emery 456
Vibbard *v.* Roderick 87
Vicary's Case 196
Vice *v.* Anson 7
v. Fleming 97, 393, 397, 411
Vigers *v.* Sainet 541
Vililia, The 568
Villa *v.* Joute 7
Vinall *v.* Burrill 189, 192, 550
Vincennes, The 559
Viner *v.* Cadell 505
Volant, The 572
Voorhees *v.* Jones 86
v. Wait 21
Vose *v.* Grant 287
Vulliamy *v.* Noble 407, 438, 449, 450, 474, 485

W.

Waddell *v.* Cook 359
Wade *v.* Jenkins 446
Wadley *v.* Jones 284
Wadsworth *v.* Manning 55
Wagner *v.* Wagner 511
Wagnon *v.* Clay 175, 216
Wainwright *v.* Crawford 568
v. Waterman 452
Wait, *In re* 474, 476, 477
Waite *v.* Dodges 33
v. Foster 392
v. Thayer 103
Waithman, *Ex parte* 196, 420
v. Miles 284, 385, 387, 399
Waland *v.* Elkins 55, 156
Walburn *v.* Ingilby 301, 541, 543, 544
Walcott *v.* Canfield 157, 175
v. Willent 572
Walden *v.* Sherburne 80, 163, 164, 170, 179, 193, 195, 200, 233
Waldo, The 572
Waldo Bank *v.* Greely 202
v. Lamber 212, 216
Walford *v.* De Pienne 24
Walker, *Ex parte* 491, 499
v. Crain 542
v. Duberry 189, 193
v. Eyth 349
v. Eyton 349
v. Harris 237
v. House 312, 316, 319, 320
v. Long 278
v. McCulloch 173
v. Symonds 515, 516
v. Trott 307, 314
Wall's Adm's *v.* Fife 105
Wallace *v.* Agry 486
v. Fairman 107
v. Fitzsimmons 396, 447
v. Kelsall 211, 293
v. Patterson 475, 481
Wallis *v.* Hirzch 247
v. Wallace 325
Wallworth *v.* Holt 300, 459, 512
Walmsley *v.* Cooper 174
v. Walmsley 521
Walney *v.* Wells 437
Walsh *v.* Adams 339, 343, 359
v. Kelly 477
Walton *v.* Dodson 175
v. Robinson 189
v. Treston 178
Wamsley *v.* Lindenberger 23
Want *v.* Reece 275, 285
Warbritton *v.* Cameron 272
Ward *v.* Brampston 337
v. Dalton 489
v. Gaunt 47
v. Howell 189
v. Johnson 65, 107
v. Lewiston 292, 334, 335
v. Morris 475
v. Motter 65, 107, 108, 110
v. Newell 532, 535

Ward *v.* Society of Attorneys 543
v. Thompson 14, 48, 117
Wardell *v.* Hughes 202
Warder *v.* Newdigate 210
Wardwell *v.* Haight 415, 418
Ware *v.* Clowny 338
Waring *v.* Cram 443, 447
v. Robinson 179, 320
Warner *v.* Cunningham 159, 439
v. Griswold 36, 334
v. Smith 34
Warren, *In re* 8, 37, 63, 126, 215, 363
v. Ball 416
v. Batchelder 485
v. Dickson 112
v. French 103
v. Taylor 297
v. Tyler 386
v. Wills 351
v. Wheelock 282
Warwick *v.* Bruce 21
Washburn *v.* Bank of Bellows Falls, 343, 345, 346, 348, 351, 352
v. Goodman 390, 392, 394, 407, 438, 442, 443, 447, 449
Watchman, The 475
Waterer *v.* Waterer 365.
Waters *v.* Taylor 299, 312, 314, 315, 316, 317, 358, 381, 458, 459, 462, 464, 511, 512
v. Tompkins 187, 428
Watkins, *Ex parte* 493, 494, 500
v. Hill 486, 567
Watkinson *v.* Bank of Penn. 411, 412, 419
v. Bernadiston 569
Watney *v.* Wells 230
Watson, *Ex parte* 22, 32, 33, 66, 76, 135, 155, 290, 477, 501, 502
v. Bourne 474
v. Fletcher 287
v. Owens 65
v. Sheath 477
v. Taylor 481
v. Wells 196, 420
v. Woodman 194
Watt *v.* Kirby 104
Watts *v.* Brook 9
Waugh *v.* Austen 475
v. Carriger 107
v. Carver 31, 36, 41, 65, 72, 78, 85, 88, 90, 136, 145, 287, 495
Way *v.* Bassett 187, 451
Waydell *v.* Luer 110, 111, 486
Weal *v.* King 157
Weald of Kent Canal Co. *v.* Robinson 546
Weaver *v.* Jones 18
v. Tapscott 110
Weaver *v.* Upton 230, 276
v. Weaver 481
Webb, *In re* 224, 287
v. Brooke 10
Webster *v.* Bray 249, 259, 261
v. Seekamp 568
v. Stearns 106, 190
v. Webster 265, 308, 397, 445, 449
Wedderburn *v.* Wedderburn 445, 447, 450, 503, 515, 524, 552
Weed *v.* Panama R. R. Co. 572
v. Richardson 112, 203
v. Small 516
Weeks *v.* Weeks 323
Weisman *v.* Smith 307
Weld *v.* Oliver 323, 555, 556
Weller *v.* Baker 338
Wells *v.* Carpenter 284
v. Evans 182
v. March 164
v. Masterman 212
v. Simons 284
v. Turner 100
v. Wells 278
Welsh *v.* Speakman 195
Wendell *v.* Van Rensselaer 494
Wendover *v.* Hagebroom 550
Werner *v.* Leisen 459
Wesson *v.* Washburn Iron Co. 372
West, *Ex parte* 22
v. Randall 475
v. Skip 2, 3, 167, 168, 344, 442, 472, 474, 481, 502, 524
West Branch Bank *v.* Moorehead 427
Westcott *v.* Price 289
v. Tyson 477
Westerdell *v.* Dale 553, 554
Westerlo *v.* Evertson 36, 280, 283, 286
Western Bank of Scotland *v.* Needell 416
Western Stage Co. *v.* Walker 170, 219, 220
Weston *v.* Barton 332, 333
v. Penniman 550
West Point Foundry Asso. *v.* Brown 6
Wetherell *v.* Spencer 566
Wetmore *v.* Baker 55, 278
Wetter *v.* Schlieper 166, 314, 317
Weyer *v.* Thornburgh 481
Weyland *v.* Elkins 55, 156
Whaley *v.* Moody 216
Wharton *v.* Fisher 483
v. Walker 485
v. Woodburn 109
Whately *v.* Manheim 195
Wheatcroft *v.* Hickman 86, 146
Wheatley *v.* Calhoun 365, 368
Wheeler, *Ex parte* 139, 497
v. Jennings 25
v. Rice 203
v. Sage 223

Wheeler *v.* Van Wort 381, 383, 384, 401, 403, 404
Wheelock *v.* Doolittle 188, 189, 190
Whelen *v.* Watmouth 510
Whipple *v.* Parker 42, 541
v. Stevens 190
Whitaker *v.* Brown 104, 105, 112, 155, 172, 200, 203, 233
Whitcomb *v.* Converse 230
v. Whiting 185, 186, 187, 188, 189, 191
v. Williams 567
White *v.* Fitzgerald 372
v. Gibson 196
v. Hackett 534, 535
v. Hall 186, 189
v. Harlow 286, 287
v. Jones 330, 353
v. Murphy 419
v. Osborn 323, 339, 555, 556
v. Phelps 323
v. Smith 157
v. Toles 210
v. Tudor 391
v. Union Ins. Co. 407, 503
v. Woodward 310
Whitehead *v.* Barron 433
v. Chadwell 492
Whiteright *v.* Stimpson 442
Whitesides *v.* Cannon 25
v. Lafferty 318, 319
Whitewright *v.* Stimpson 533
Whiting *v.* Furanet 480
Whitman *v.* Boston & Maine R. R. 367
v. Leonard 420, 463, 470
v Porter 44
v. Robinson 234
Whitmore, *Ex parte* 149, 435, 485, 488
v. Adams 204
Whitney *v.* Dean 283
v. Dutch 19
v. Ferris 133, 194
v. Ludington 46, 86
v. McKechnie 334
v. Sterling 194
v. Reese 190
Whittaker *v.* Howe 264
Whittingham *v.* Hill 18
Whittle *v.* M'Farlane 229
Whitton *v.* Hulbert 163
v. Smith 381
Whitwell *v.* Warner 385
Whitworth *v.* Harris 13
Whywall *v.* Champion 18
Wickham *v.* Wickham 431
Widdifield *v.* Widdifield 7
Wide *v.* Jenkins 516
Wiggin *v.* Cummings 269
v. Goodwin 511
v. Tudor 173
Wiggins *v.* Hammond 104
v. Cummings 275
Wightman *v.* Townroe 146, 454, 505
Wilby *v.* Phinney 279, 281, 285, 394, 449
Wilcox *v.* Roath 19
v. Singletary 178
Wild *v.* Dean 487, 488
Wilde *v.* Jenkins 514, 520
Wilder *v.* Keeler 349, 448
Wildes *v.* Fessenden 110, 422, 487
Wildman, *Ex parte* 489
Wiles *v.* Maddox 351, 358
Wilkins *v.* Davis 469, 472, 475
v. Pearce 97, 98
v. Reed 565, 567
Wilkinson, *Ex parte* 497
v. Candlish 100
v. Frazier 59, 76
v. Henderson 348, 448, 485
v. Jett 59
v. Stafford 456
v. Torkington 237
Wilks *v.* Back 149, 214
Willard *v.* Stone 21
Willett *v.* Blanford 230, 444, 524
v. Brown 372
v. Chambers 39, 150, 526
Williams, *Ex parte* 149, 160, 167, 333, 344, 345, 346, 351, 388, 393, 435, 440, 461, 471, 480, 481, 484, 486, 493, 496, 497, 503
v. Attenborough 36
v. Bank of Michigan 541
v. Barrett 210
v. Beaumont 338
v. Bingley 305
v. Bowers 411
v. Brimhale 12
v. Butler 7
v. Gage 345
v. Gilchrist 112, 202
v. Gridley 190
v. Henshaw 271, 273, 275, 279, 280, 281, 284, 523
v. Hodgson 107, 108, 109, 180, 196, 510
v. Jones 14
v. Keats 132, 411, 414
v. Moor 18
v. Rawlinson 432
v. Savage Manuf. Co. 516
v. Thomas 100, 200, 552
v. Thorp 497
v. Walbridge 203, 216
v. Walsby 180
v. Williams 306
v. Wilson 262, 264, 315, 316, 444
Williamson *v.* Fox 412
v. Johnson 126, 128, 213, 255
v. Haycock 297
v. McGinnis 157
v. Naylor 454
v. Wilson 316, 318, 320, 438, 459, 461, 469

Willings *v.* Blight 559, 561
v. Consequa 65, 109, 173
Willis *v.* Dyson 97, 98, 397, 411
v. Freeman 364, 474, 481
v. Green 40
v. Hill 104, 189, 213
v. Jernegan 513, 519, 520
Willison *v.* Patteson 27, 28
Willock, *Ex parte* 502
Wills *v.* Simmonds 44
Wilsford *v.* Wood 14, 331
Wilson, *Ex parte* 407, 484
v. Bowden 168
v. Campbell 12
v. Conine 338, 481
v. Curzon 545
v. Cutting 273
v. Dickson 552, 572
v. Forder 194
v. Gibbs 480
v. Greenwood 160, 313, 314, 316, 317, 319, 388, 393, 446, 459, 461, 469, 471, 472, 503, 511
v. Hirst 433
v. Hunter 181, 366
v. Lasson 457, 510
v. Lewis 112, 207
v. Mower 174
v. Reed 323, 324, 339, 555, 556
v. Robertson 493
v. Soper 167, 345, 346, 351
v. Stilwell 390
v. Torbet 190
v. Turnman 150
v. Wallace 128, 291, 292, 329, 501
v. Whitehead 55, 118
v. Williams 112, 203, 205
Wiltram *v.* Van Wormer 201
Windham Co. Bank *v.* Kendall 201
Windsor Castle, The 561
Winget *v.* Heathcote 317
Winship *v.* Bank of U. S. 33, 56, 62, 63, 105, 163, 170, 172, 175, 200, 201, 233
Winsor *v.* Cutts 144
Winsten *v.* Ewing 343
Winter *v.* Innes 111, 485
v. White 278, 283
Wintle *v.* Crowther 64, 111, 112, 175, 201, 207
Wise *v.* Copley 112, 210
Wish *v.* Small 48, 58
Wisham *v.* Kay 349
Withers *v.* Withers 522
Withington *v.* Herring 76
Witter *v.* McNiel 181
v. Richards 310, 343, 345, 501
Woddrop *v.* Wards 345, 503
Wolbert *v.* Harris 314, 315, 320
Wolf *v.* Mills 152
Wood, *Ex parte* 26, 162, 491, 496, 497
Wood *v.* Beath 44
v. Bodwell 486, 567
v. Braddick 188, 189, 191, 192, 193, 194, 387, 395
v. Connell 175
v. Copper Miner's Co. 248
v. Creditors of Weir 569
v. Dodgson 477, 479, 502
v. Dummer 442
v. O'Kelley 292, 334
v. Pennell 66, 119
v. Rutland Ins. Co. 330, 336
v. Scoles 231, 521
v. Shepherd 164, 176, 178
v. Vallette 42, 56, 81, 89
Woodbridge *v.* Swann 477
v. Wilkins 363
Woodford *v.* Downer 387
Woodgate, *Ex parte* 497
Woodman *v.* Cowing 2
Woods *v.* Wilder 27
Woodward, *Ex parte* 451
In re 17
v. Cowing 2, 43
v. Gyles 251
v. Newhall 23
v. Schatzell 307
v. Winship 176
Woodworth *v.* Downer 192
v. Fuller 325
Wooley *v.* Batte 286
Woolley *v.* Kelly 350, 421
Worcester Corn Exc. Co., *In re* 43, 96, 100, 543
Wormley *v.* Wormley 515
Worrall *v.* Munne 181, 183
Worsley *v.* De Mattos 496
Worts *v.* Pern 302
Wray *v.* Hutchinson 303, 458, 464
v. Milestone 278, 281, 283
Wren *v.* Kirton 36
Wrexham *v.* Huddleston 159, 464
Wright *v.* Cumpsty 272, 278
v. Davidson 72
v. Hunter 272, 273, 285, 286, 295, 548, 551, 554, 556, 565, 567
v. Michie 271, 275
v. Pratt 494
v. Pulham 411, 413, 419
v. Russell 331, 332
v. Williamson 329, 334
v. Wright 24
Wrightson *v.* Pullan 391, 411, 413, 419
Wyatt *v.* Marquis of Hertford 566, 567
v. Hudson 186, 187

Y.

Yale *v.* Eames 193, 392, 447
v. Yale 210

Yallop, *Ex parte* 493, 496
Yandes *v.* Lefavour 173, 180
Yarnell *v.* Anderson 111, 424, 425, 485
Yeager *v.* Wallace 95, 210, 321
Yeatman *v.* Worde 373
Yonge, *Ex parte* 228, 477, 492, 500
York *v.* Clemens 7, 364
v. Eaton 441
York & North Midland R. R. Co. *v.* Hudson 394
Young, *Ex parte* 344, 473, 477, 479, 548, 550, 551, 552, 554, 563, 564, 570
v. Axtell 65, 119, 120, 132, 136, 138, 142
v. Brander 552, 553, 569
v. Brick 278
Young *v.* Goodson 174
v. Hunter 64, 104, 114, 118, 433
v. Keighly 163, 165, 442, 481, 545, 547
v. Smith 194
v. Tibbetts 413
v. Timmings 410

Z.

Zenobia, The 572
Zent *v.* Heart 188, 190
Zettee *v.* Soper 99
Zoller *v.* Janvrin 411, 413
Zuel *v.* Bowen 201

THE LAW OF PARTNERSHIP.

CHAPTER I.

OF THE ORIGIN AND PURPOSE OF PARTNERSHIP.

THE Law of Partnership, as it exists in England and in this country, constitutes a system by itself. Its origin cannot be found, excepting in the Law-Merchant, which is itself only the custom of merchants, adopted, systematized, and enforced by the courts. (*a*)

Commercial partnerships were known to the Romans; and their law recognized and regulated them. So far as commerce was then conducted in a similar manner and upon similar principles as at present, the rules of the Roman law are applicable now; for that law, quite as much as our own, applied to the transactions of merchants a law founded upon their usages; and to this extent we may regard the Roman civil law of partnership as similar to our own. As a very large part of commercial business consists in forming and executing contracts which must be governed by the law of contracts generally,

(*a*) Thus the peculiar doctrines of the law of partnership, which most distinguish it from the common law, as that there is no survivorship of property or rights between partners (except for the settlement of the business), that the act of one partner, in reference to a partnership matter, is the act of all, are declared by the earliest authorities to be "*per legem mercatoriam*," and "*pro beneficio commercii*." Jenkins, 160; Co. Litt. 182 a; 2 Brown, 99; Jeffreys *v.* Small, 1 Vernon, 217; Leake *v.* Craddock, 3 P. Wms. 158; Vanheath *v.* Turner, Winch. 24; Molloy, b. 2, ch. 10, § 19. The case of Pinckney *v.* Hall is thus reported in 1 Salk. 126: "*By the custom of England*, where there are two joint traders, and one accepts a bill drawn on both for him and partner, it binds both if it concerns the trade; otherwise, if it concerns the acceptor only in a distinct interest and respect." ——*v.* Layfield, 1 Salk. 292. See also 2 Rol. Abr. 702, 370; Anon., Styles, 370 A.

*2 and this is a part of the common law, * many of the principles applicable to partnership are the same as those which regulate the common transactions of men; and so far the law of partnership may be said to be founded upon the common law. We doubt, however, whether any thing is gained by references of this kind. The supposed analogies between the law of partnership and other branches of the law, if they sometimes afford ample illustration, lead to confusion and error when we attempt to carry them far; or, by their help, deduce from other departments of the law a rule which may control and determine a question of partnership.

Thus partnership has been compared to tenancy in common, and also to joint tenancy; and has been said to be one or other of these, modified in certain ways. This was the view taken in all the early books. (*b*) But this is no more true than that tenancy in common or joint tenancy is a modified partnership. The three things are essentially distinct. They all have the element of joint ownership of property; but in all other respects are different and independent; and the law of each must be sought for in itself. Only when a partnership has terminated, may the former partners be considered as tenants in common of the property not yet divided among them; but even then certain peculiar rights and principles attach to the property, or to the interests of the parties, growing out of the former partnership. And as to joint tenancy, not only may all of the four unities, — title, interest, time, and possession, — every one of which is essential to joint tenancy, be absent from partnership, but, beside this technical difference, the substantial characteristic of joint tenancy, which is the right of survivorship, is wholly wanting in fact in partnership, for it exists there only in form and as a mere trust for the purpose of settlement. (*c*) And it may be added that partnership differs from

(*b*) See *ante*, p. 1, note (*a*). See also 38 Edw. III. 7; tit. "Accompt;" Bac. Abr., tit. "Joint Tenants," &c. (C); Com. Dig. tit. "Merchant" (D). In West *v.* Skip, 1 Ves. Sen. 239, Lord Chancellor Hardwicke uses the following language: "The partners themselves are clearly joint tenants in the stock and all effects; not only that particular stock in being at the time of entering into the partnership, but to continue so throughout, whatever changes might be made in the course of the trade." Of modern law-writers, Story is perhaps the only one who denies the accuracy of this view. Story on Part. § 90, et seq.

(*c*) Co. Litt. 186 a; 2 Bl. Com. 183;

both * of these species of joint ownership, in this, — * 3
that neither joint tenant nor tenant in common can alienate more than his own interest in the joint property, whereas each partner has usually a power of disposition over all the partnership effects. Our conclusion is, that the law of partnership is an entirely distinct and independent branch of the law; and we have made these remarks because it has not always been so considered. When these species of joint interest and ownership came under the cognizance of the courts of England it was new to them, and new to the law of England; and it was perhaps unavoidable that they who administered the law should have sought to bring this new topic within the rules and principles of those kinds of joint ownership which were well known. For this not only seemed to preserve the unity and symmetry of the law, but relieved the courts just so far from the labor and the hazard of framing new rules for these new relations. Perhaps this was not only inevitable, but wise, at the beginning. We think, however, that it has been carried too far and continued too long in England. And even in this country, at the present time, perhaps something would be gained, if, when new questions in partnership arise, the courts looked for assistance, in giving an answer, to the existing system of the law of partnership; which, if it does not provide in advance for all possible questions, contains within itself principles that, generally at least, will suggest the proper answers. And if they fail, and an absolutely new question demands an absolutely new answer, it will be safer to look to the reason and justice of the case, and the usage of merchants if there be one, than to remote and disconnected branches of law, resembling partnership in some respects, but differing from it in still more.

The law of partnership is at once more important and more difficult in this country than in any other. The general pur-

Com Dig. "Estate," K. 6, K. 8; Fox *v.* Hanbury, Cowp. 445; Woodman *v.* Cowing, 11 Me. 1. Partnership is also unlike tenancy in common in that each co-tenant is entitled, as against his co-tenants, to a specific share as interest in the common property *in specie*, while a partner can claim only his proportion of the residue found to belong to him upon a balance of account. West *v.* Skip, 1 Ves. 392; Taylor *v.* Fields, 4 id. 396; Dutton *v.* Morrison, 17 id. 193.

pose of mercantile partnership is twofold: either to aggregate capital, or combine the capital of one with the labor and skill of another; or to apply the principle of association and division of labor and all the advantage of common interest and common action to mercantile transactions.

*4 * As to the first of these objects, it is obvious that a country in which commercial enterprise is perfectly free, and well rewarded, and finds an almost boundless field for action, while at the same time there is a want of capital in comparison with that of older and wealthier nations, is precisely the place in which it would be most common to supply this want of capital by bringing small portions of it into a common stock. And, as to the second, there is among us a strong and universal tendency to association, to a joinder of interest and a joinder of action, which pervades us as a people. Every thing that is done, from the bond which makes our whole country a state composed of states, to the habit which fills all our cities and villages with partnerships, illustrates this tendency. If we look upon the signs over the doors of shops or stores, from the main streets of business of our wealthiest marts to the smallest settlements of the interior, we shall find more names than one upon a majority of them. And it is perhaps a curious recognition of the universality of the principle of association, and of the advantage which it is believed to give, that it is not uncommon for traders who have no partner, to put to their names the addition of "and Co.," to give themselves the appearance and respectability of partnership; a practice which it has been thought necessary to prohibit by statute in New York. (*d*)

Thus we explain the fact that partnership is far more common here than it is anywhere else; and of course the law of partnership is more important, if only because it is more often appealed to. But this law is, as we have said, not only more important in this country, but more difficult. All business action is with us entirely free and untrammelled; and, as a consequence of this, business enterprise — which encounters all risks, and explores all paths which seem to open, and perpetu-

(*d*) See *post*, p. *255.

ally seeks for profitable novelties — is far greater here than elsewhere. And beside this, as any man may be, or try to be, a merchant of any kind in this country, many who are inexperienced, and ignorant, and unqualified, engage in business; and as they do not go in the established ways, because they do not know them, they are often getting into difficulties not known elsewhere, and exhibiting new complications, which raise new questions.

Nor is this all. If partnership offers important advantages, it also exposes those who enter into it to peculiar liabilities. The safety of society requires this. If every partner were not held * absolutely for the whole amount of all the debts * 5 of the firm, by which soever of the partners they were contracted, a wide door would be opened for fraud and public loss. It is, however, a very common thing for persons to try, in a vast variety of ways, to gain all the advantages and profits of partnership, without encountering these liabilities; or to escape from these liabilities when loss has accrued. This the law forbids, and, as far as it can, prevents; and it must therefore be always ready to meet the contrivances, evasions, and disguises resorted to by ingenious men. A very large proportion of the many questions under the law of partnership, which are constantly coming before our courts, is of this kind.

There seems to be a necessity, therefore, that the law of partnership should have a greater development and precision in this country than elsewhere; and this seems also to be the fact. The jurisprudence of England appears to have borrowed something from us. And lately parliament has endeavored to introduce to some extent our system of Limited Partnership, borrowed by us from Continental Europe, and improved. By this we endeavor to facilitate the aggregation of capital, and its employment in business transactions, by affording many of the advantages of partnership, with less than the general liability; and to guard this privilege by well-devised provisions for the safety of the community. But England, or at least its government, does not seem able as yet fully to adopt this system, although the experience of this country proves its utility and safety.

CHAPTER II.

WHAT PARTNERSHIP IS, AND HOW IT IS MADE.

SECTION I.

WHAT PARTNERSHIP IS.

We define partnership as the combination by two or more persons of capital, or labor, or skill, for the purpose of business for their common benefit.

Considering this as the definition of a partnership, the topics it suggests are: First, the way in which it may be made. Second, who may be partners. Third, what the partners may bring into the common stock. Fourth, for what purposes a partnership may be formed.

SECTION II.

HOW PARTNERSHIP MAY BE MADE.

There must be a lawful and valid agreement to enter into partnership; and this contract must be executed. And therefore courts do not declare persons to be partners under an agreement of partnership, without proof that some joint transactions have been undertaken in accordance with it, or some joint benefit received. (*a*) But a partnership may be made by

(*a*) Metcalf *v.* Royal Exch. Ass. Co., Barnard. 343; Heyhoe *v.* Barge, 9 C. B. 431; West Point Foundry Association *v.* Brown, 3 Edw. Ch. 284; Atkins *v.* Hunt, 14 N. H. 205; Goddard *v.* Pratt, 16 Pick. 412. If two or more persons, who agree to enter into partnership, stipulate each to furnish a certain amount of capital, compliance with this stipulation *may be* a condition precedent, without the fulfilment of which no partnership will exist, unless it be waived by the consent of both parties. McGraw *v.* Pulling, 1 Freem. Ch. 357; Bird *v.* Hamilton, Walker Ch. 361. Where E. advanced money to W., to enable him to perfect and realize a certain invention, and W., beside expressly promising to repay the advance, agreed that, if the invention should be one of public or private use, W. should have

an agent; and, if by one not then an agent, a subsequent ratification makes the partnership effectual. (*aa*) Not unfrequently in England, and more rarely here, * the con- * 7
tract is sealed; but this can seldom be useful, and is never necessary to its validity. Usually the contract is in writing; and should always be so, as a matter of reasonable precaution. But writing is not essential to render the general agreement, or any of its details, valid. (*b*) And though articles exist, the partnership may be proved by parol, if the question is between those who form the firm, and a stranger. (*bb*)

Whether a partnership exists is a question of fact; what a partnership is, is a question of law. (*c*) Sometimes, although rarely, the question occurs, whether the provisions of a partnership come within the requirement of the Statute of Frauds, and must therefore according to some authorities be in writing; but this may be doubted. (*d*)

one-third of the profits thereof; *held*, that E. might sue W. for the sum so advanced. Elgie *v.* Webster, 5 M. & W. 518. So in Burnell *v.* Hunt, 5 Jur. 650, where B. was to receive from A., for superintending the latter's manufactory, half the profits as soon as any accrued, and, till that time, 2*l.* per week. No profits having ever arisen, the court held that there could be no partnership before that time. If a man make an agreement for a partnership, but expressly reserve for himself for twelve months the option of determining finally whether or not he will be a partner, he is not one until he exercises that option and declares himself such. Gabriel *v.* Evill, 9 M. & W. 297. See Chapman *v.* Wilson, 1 Rob. (Va.) 267; President, Directors, & Co. of the Adams Bank *v.* Rice, 2 Allen, 480; Andrews *v.* Garstin, 10 C. B. N. S. (100 Eng. Com. L. R.) 444; Lascaridi *v.* Gurney, 11 C. B. N. S. (103 Eng. Com. L. R.) 890; Moody *v.* Rathburn, 7 Minn. 89; Cook *v.* Carpenter, 34 Vt. 121. Where one permits another to buy stock on their joint account, in anticipation of forming a partnership, and immediately afterwards repudiates the agreement to become a partner, he is not entitled to any of the property bought, nor are his individual creditors. Rice *v.* Shuman, 43 Penn. 37. See, as to what connection in business constitutes a partnership, and the admission of new members, Meaher *v.* Cox, 37 Ala. 201.

(*aa*) Williams *v.* Butler, 35 Ill. 544.

(*b*) The true meaning and application of this rule is clearly stated by Tindal, C. J., in Fox *v.* Clifton, 9 Bing. 117. See also Smith *v.* Tarlton, 2 Barb. Ch. 336.

(*bb*) Anderson *v.* Clay, 1 Stark. 405; Griffin *v.* Doe, 12 Ala. 783; Widdifield *v.* Widdifield, 2 Binn. 245; Bonnaffe *v.* Fenner, 6 Smedes & M. 212; Allen *v.* Rostain, 11 S. & R. 362. Otherwise, perhaps, where the question of partnership or no partnership arises between the partners themselves. Cutler *v.* Thomas, 25 Vt. 73. See Buffum *v.* Buffum, 49 Me. 108, and Villa *v.* Jonte, 17 La. Ann. 9.

(*c*) Gabriel *v.* Evill, Car. & M. 358; Drake *v.* Elwyn, 1 Caines, 184; Beecham *v.* Dodd, 3 Harring. (Del.) 485; Doggett *v.* Jordan, 2 Fla. 541; Everett *v.* Chapman, 6 Conn. 347; Terrell *v.* Richards, 1 Nott & McC. 20. See Dwinell *v.* Stone, 30 Me. 384.

(*d*) Vice *v.* Anson, 7 B. & C. 409; Smith *v.* Burnham, 3 Sumn. 435. In

* 8 * It becomes more important, and indeed necessary, that the contract should be reduced to writing, in propor-

this last case, the plaintiff brought his bill in equity, alleging an agreement of copartnership between himself and the defendant for general business purposes, and, among others, for the purchase and sale of lands, and praying for a general account of the affairs of the partnership. The existence of the partnership was attempted to be proved only by parol. *Held*, per Story, J., that a verbal agreement to become interested as partners in the purchase and sale of lands was a parol contract respecting an interest in lands within the Statute of Frauds, and therefore void. So in Henderson *v.* Hudson, 1 Munf. 510. [And this appears to be the law of Pennsylvania. Lefevre's Appeal, 69 Penn. St. 123; Ebbart's Appeal, 70 Penn. St. 79.] But in Dale *v.* Hamilton, 5 Hare, 369, a different view would seem to have prevailed. In that case, the bill of the plaintiff, a land agent and surveyor, alleged a parol agreement of copartnership with the defendants, who were capitalists, for the sole purpose of speculation in lands; and that, by the terms of their agreement, each of the parties was to be interested one-third in profits and losses. Real estate had confessedly been acquired under some arrangement of this sort, which had since greatly risen in value. The prayer of the plaintiff was, that the affairs of the joint concern might be wound up, the lands sold for the most they would fetch, and the proceeds distributed by the court in accordance with the terms of the said contract. The Vice-Chancellor (after a statement of the question raised) said: "When the proposition was first advanced by the plaintiff, I confess, it appeared to me, that to admit the argument to the extent contended for would be virtually to repeal the Statute of Frauds, or nearly so." But, upon examination of the authorities, he felt himself bound to hold that the plaintiff might first prove by parol the existence of the partnership, as an independent fact, and, that being established, might then show by the same evidence his interest in the lands, considered as the substratum or stock of the partnership. An issue was accordingly directed to determine whether such an agreement of copartnership as that alleged in the bill had been made. [See Caddeck *v.* Simpson, 2 De G. & J. 52.] In Fall River Whaling Co. *v.* Borden, 10 Cush. 458, where both the above cases are examined, the existence of the copartnership was evidenced by the books and other *written* transactions of the parties, and was therefore held to be proved by a memorandum in writing in compliance with the statute. See Haupf *v.* Howard, 3 Jones Eq. 440, 445. In Smith *v.* Tarlton, 2 Barb. Ch. 336, an agreement of copartnership to last three years was entered into by parol. *Held*, that this was not an agreement not to be performed within one year within the Statute of Frauds. The object of the partnership was to carry on a certain kind of manufacture, and with that end to purchase a water privilege and site, and to erect suitable buildings. *Held*, that the contract of partnership was valid, though made by parol with the design of purchasing real estate for the purposes of the firm, and that such real estate was partnership property subject to partnership equities. It is *held* by Ware, J., in the case of *In re* Warren, Daveis, 320, that a partnership for buying and selling lands may be proved by the same evidence as a partnership for ordinary mercantile business, so far as third persons are involved. The result of the cases, as well as of true reasoning upon the question, would seem to be that of the Vice-Chancellor in Dale *v.* Hamilton, *supra*. See Julio *v.* Ingalls, 1 Allen, 41; Storer *v.* Flack, 41 Barb. 162; Jones *v.* McMichael, 12 Rich Law (S. C.), 176. [Chester *v.* Dickerson, 54 N. Y. 1; Sherwood *v.* St. Paul R. R. Co., 21 Minn. 127; Scruggs *v.* Russell,

tion as it is composed of many articles, and provides in detail for the transaction of the business of the firm, or for the rights and duties of the partners. Of the effect and construction of written articles we shall speak particularly hereafter. (*e*)

Partnership may be formed not only by express agreement, but may grow out of transactions or relations in which the word "partnership" is not uttered. If there is such a joinder of interests and action as the law considers as the equivalent of partnership, or *rather, such as it re- *9
gards as constituting partnership, it will give to the persons engaged in it all the rights, and lay upon them all the responsibilities, and give to third parties dealing with them all the remedies, which belong to partnership. Of this we shall treat somewhat in the chapter on the rights and obligations of partners between themselves, but more in that upon their obligations to third parties. (*f*)

That the contract may be legal, it must be formed for a legal purpose. (*g*) It is obvious that the law — through the courts — cannot protect or enforce what the law forbids. (*h*)

McCahon (Kan.), 39; York *v.* Clemens, 41 Iowa, 95.]

(*e*) Ch. 7, § 7.

(*f*) Chs. 5, 6.

(*g*) The English law has at different periods laid various restrictions upon the formation of partnerships, some designed to secure monopolies to one or several large incorporated companies, and which have since been repealed or greatly modified, while others have aimed at the more laudable object of protecting the public from the combinations and the delusive schemes of speculators. Thus the statute of 6 Anne, ch. 22, § 9, made it unlawful for a partnership of more than six persons, other than the Bank of England, to carry on banking business. By 6 Geo. 1, ch. 18, § 12, partnerships were forbidden to engage in the business of marine insurance, or to make loans upon bottomry. In like manner, by 28 Geo. 3, ch. 53, § 2, partnerships of more than five persons for trading in lands are made illegal. See further 6 Geo. 1, ch. 18, § 18; also, 39 & 40 Geo. 3, ch. 99, regulating the pawnbrokers' trade. See Armstrong *v.* Lewis, 2 C. & M. 274; Armstrong, *v.* Armstrong, 2 Mylne & K. 45; Gardon *v.* Slowden, 12 Clark & F. 237. There have also been certain restrictive statutes, which have been passed rather to protect the revenue of the realm than to afford security to the public. Hence it is held, in several cases, that, though a partnership be formed in disregard of the provisions of these statutes, yet such infringement will not deprive the partnership of the right to recover upon their contracts with third persons. Hodgson *v.* Temple, 5 Taunt. 181; Johnson *v.* Hudson, 11 East, 180; Brown *v.* Duncan, 5 B. & C. 93.

(*h*) A distinction was formerly made between contracts of partnership for objects which are *mala in se*, and those for objects which are only *mala prohibita*. It was *held* that contracts arising out of the transactions of a partnership, formed for purposes which were inhibited by positive statute *merely*,

* 10 Hence a partnership * would be deemed void because illegal, not only if it contemplated a business which the

might be recognized and enforced by the courts, if they were one step removed from the illegal contract itself. *Ex parte* Balmer, 13 Ves. 313. Thus, in Faikney *v.* Reynous, 4 Burr. 2069, the action was debt upon a bond. The defendant pleaded an act of parliament "to prevent the infamous practice of stock-jobbing;" that the plaintiff and one Richardson were partners; that in the partnership business the plaintiff had paid out large sums, contrary to the provisions of the said statute; and that the bond in suit was given to secure to the plaintiff the repayment from Richardson of a moiety of such illegal expenditure. Demurrer joined. Ld. Mansfield: "The offence relied upon as furnishing a ground of defence . . . is not *malum in se;* 'tis only prohibited by this act of parliament." The other judges observed, "that paying money to compound these differences was not a *malum in se,* but only stood prohibited by this act; which neither says nor means to invalidate all securities relating to it: it only prohibits paying or receiving money for compounding differences." Per Cur., unanimously, judgment for plaintiff. Upon the authority of this case, a similar decision was made in Petrie *v.* Hannay, 3 T. R. 418; and in Watts *v.* Brook, 3 Ves. 612. The Lord Chancellor, upon the same ground, sustained a bill for an account between partners engaged, contrary to act of parliament, in the business of marine insurance. See also Berkshire *v.* Evans, 4 Leigh, 223. But these cases were in conflict with previous adjudication, and cannot be regarded as decided upon sound principles. Sullivan *v.* Greaves, Park on Ins. 8. In Bensley *v.* Bignold, 5 B. & Ald. 335, Best, J., says: "The distinction between *mala prohibita* and *mala in se* has been long since exploded. It was not founded upon any sound principle; for it is equally unfit that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing be prohibited because it is against good morals, or whether it be prohibited because it is against the interests of the state." Mitchell *v.* Cockburne, 2 H. Bl. 379; Aubert *v.* Maze, 2 Bos. & Pul. 371; Ewing *v.* Osbaldistone, 2 My. & Cr. 53. See also Cannan *v.* Bryce, 3 B. & Ald. 179; Steers *v.* Lashley, 6 T. R. 61; Brown *v.* Turner, 7 id. 630; Webb *v.* Brooke, 3 Taunt. 6; Simpson *v.* Bloss, 1 Taunt. 246; Ottley *v.* Browne, 1 Ball & B. 360; *Ex parte* Randleson, 1 Mont. & M'A. 36, and cases cited. Compare with these cases Sharp *v.* Taylor, 2 Phillips, 801. Nor will the courts any more sustain an action brought in revocation and disaffirmance of an illegal contract of partnership. Booth *v.* Hodgson, 6 T. R. 405; *Ex parte* Bell, 1 M. & S. 751. But though equity will not sustain a bill for an account of illegal partnership transactions, yet, if a part of the business of the partnership be legal and a part illegal, an account of that which is legal may be directed; as where the business of a firm was that of brokers and underwriters, the court dismissed so much of the bill as sought for an account of the profits of the underwriting business, but decreed an account of the other business. Knowles *v.* Haughton, 11 Ves. 168. Where the business of pawnbrokers was carried on by two persons under a deed of partnership, but under the apparent conduct and in the name of one, and he only was licensed, *semble,* that although the parties might have made themselves liable to the penalties imposed by 39 & 40 Geo. 3, ch. 99, yet that, it being no part of the contract to carry on the partnership in such a manner as to contravene the law, the contract was not void; but that, had a collateral agreement to carry on the partnership, in violation of the act of parliament, been proved, no rights could have been acquired under it by either party. Armstrong *v.* Lewis, 2 Cromp. & M. 274.

law expressly prohibits, as smuggling, gambling, making counterfeit bills or false coin to be used at home, or stealing, but also if it were formed for a purpose distinctly opposed to the principles or policy of the law; as, to procure the election of persons to office, or the success of a political party, or for marriage brokerage. (*i*) Whether our courts would take notice, in this way, of a breach of a foreign law, has not been, so far as we know, determined by adjudication. If, for example, a
* partnership were formed in New York to make coun- * 11
terfeit Bank of England notes, to be used only in England, or false coin to be exported to the West Indies, it may be a question whether our courts would sanction such a partnership. We are of opinion they should not; and, perhaps, that they would not. This may well be doubted, however; for it seems to be well established, both in England and in this country, that the courts will take notice of no violation of law at home, excepting of the law of the country to which the tribunal belongs. This rule grew, in many of its applications at least, out of the unwillingness of the English courts to interfere with the very profitable trade which Englishmen have sometimes carried on with foreign nations, in violation of the municipal law of those nations. The law of Shipping and the law of Insurance have many instances in which this rule is in force; and it seems now to be adopted in this country. (*j*)

(*i*) M., an agent and officer of the government, contracted with B. for the rebuilding of Fort Washington, and stipulated for a share in the profits of the undertaking. The frauds upon the government, by which the expected profits, in part at least, were to be gained, were detected and prevented. B. filed a bill in equity to compel an alleged partner in the transaction to account for his share of the loss sustained in the execution of the contract. Baldwin, J.: "To state such a case is to decide it. Public morals, public justice, and the well-established principles of all judicial tribunals, alike forbid the interposition of courts of justice to lend their aid to purposes like this." Bartle *v.* Coleman, 4 Pet. 184.

(*j*) Planche *v.* Fletcher, Doug. 251; Lever *v.* Fletcher, cited in Park on Ins. 507; Boucher *v.* Lawson, Cas. temp. Hardw. 183; Holman *v.* Johnson, Cowp. 341; Pellecat *v.* Angell, 2 Cromp., M. & R. 311; Sharp *v.* Taylor, 2 Phillips, 801; Gardiner *v.* Smith, 1 Johns. Cas. 141; Richardson *v.* Marine Ins. Co., 6 Mass. 102; Parker *v.* Jones, 13 id. 173; Andrews *v.* Essex F. & M. Ins. Co., 3 Mason, 6; Archibald *v.* Mercantile Ins. Co., 3 Pick. 70. The rule, as now understood and applied, was first definitely settled by Lord Mansfield. It has ever since been invariably followed by the English judges, and, as we have seen, is firmly established in this country. But its morality has been often and gravely questioned. Of the Continental writers, Valin, Emerigon, and Pardessus, admitting the existence of

The contract of partnership must be voluntary; that is, all the partners must consent and agree to it. This is so essential, that no person can be introduced into a firm without the consent of all who are members of it. (*k*) This consent
* 12 may be * implied; (*l*) and even if one or more members were reluctant, and made objections, and never expressly gave their assent, still it might be inferred from their acts, if

the rule, justify it only on the ground of the concurrent usage of nations, while Pothier, on strictly moral grounds, pointedly condemns it. 2 Valin, 128, note; 1 Emerigon, 210–215; Pardessus, Cours de Droit Com., tom. 111, art. 792; Pothier, Traité d'Assurance, No. 58. The English law-writers are divided on the question. Miller, Park, and Arnould openly or tacitly sustain the morality of the English doctrine. On the other hand, Marshall and Chitty adopt and support the views of Pothier. Miller on Ins. 23; Park on Ins. 236; Arnould on Ins. 706, 707; 1 Marshall on Ins. 59, 61; 1 Chitty on Com. Law, 82, 84. Chancellor Kent speaks of the rule as one "which does no credit to the commercial jurisprudence of the age;" and Mr. Justice Story says, "An enlightened policy, founded upon national justice as well as national interest, would seem to favor the opinion of Pothier in all cases, where practical legislation has not adopted the principle as a retaliation upon the narrow and exclusive revenue system of another nation." 3 Kent. Com. 265; Story, Confl. of Laws, § 257.

(*k*) *Ex parte* Barrow, 2 Rose, 255; Kingman *v.* Spurr, 7 Pick. 235; Murray *v.* Bogert, 14 Johns. 318; Channel *v.* Fassit, 16 Ohio, 166; Moddewell *v.* Keever, 8 Watts & S. 63; Nicoll *v.* Mumford, 4 Johns. Ch. 522. [Partnerships *inter sese* can only be formed by the contract of the parties. Freeman *v.* Bloomfield, 43 Mo. 391; Metcalf *v.* Redmon, 43 Ill. 264.] See Brown *v.* De Tastet, Jacob, 284; Bray *v.* Fromont, 6 Madd. 5; Mathewson *v.* Clark, 6 How. 122; Goddard *v.* Hodges, 1 Cromp. & M. 33. Upon this principle of *dilectus personæ*, neither the representatives of a deceased partner, nor the assignees of one bankrupt, become partners with the surviving or solvent partners, but are simply entitled to an account. Pearce *v.* Chamberlin, 2 Ves. 33; Marquand *v.* N. Y. Man. Co., 17 Johns. 525; Griswold *v.* Waddington, 15 id. 82. In the civil law, the doctrine was even carried to the length of making null and void stipulations in the articles of association that heirs or representatives should themselves be partners. Otherwise in the English and American law. See *post* [p. * 159].

(*l*) Mason *v.* Connell, 1 Whart. 381. The question in this case was, whether the firm of A. & B. was partner with C. The evidence offered on this point was a written agreement of copartnership to which was signed the name of C., and also the name of the firm of A. & B., in the handwriting of A. *Held*, that engaging the firm in such a partnership was out of the ordinary commercial transactions, and was therefore presumed to be without the scope of one partner's authority. But, though the consent of each partner was absolutely necessary to constitute a partnership, yet that such consent might be testified in express terms, or the assent might be tacit, or to be implied solely from the acts and conduct of the parties. [General reputation is not evidence of partnership, Campbell *v.* Hastings, 29 Ark. 512; Bowen *v.* Rutherford, 60 Ill. 41; or of its dissolution, Pitcher *v.* Barrows, 17 Pick. (Mass.) 361; nor are the admissions of an alleged partner, till shown *aliunde* to be a partner, Cross *v.* Langley, 50 Ala. 8; Converse *v.* Shanbaugh, 4 Neb. 376; Allcott *v.* Strong, 9 Cush. (Mass.) 31; Tumlin *v.* Goldsmith, 40 Ga. 221; Southwick *v.* McGovern, 28 Ill. 533. See also *post*, p. * 195.]

the alleged partner or partners were treated by the other partners and in their transactions as only a partner could be or should be treated. (*ll*) Still there must be this consent; and we shall presently see that if a partner sells out all his interest in a firm to a third person, and expressly agrees with him that he shall take the seller's place in the partnership, this will not make him a partner, unless the other partners receive him as such. (*m*)

If the articles of the copartnership provided, somewhat in the way those of joint-stock companies do, that a copartner might, in a certain way, and upon certain terms, transfer all his interest and rights in the company to a third person, who should, by force of the transfer, become a copartner in the transferrer's stead, a court of equity generally would, and a court of law might, so far recognize the force of this provision as to hold such transferee partner at once. (*n*) It is certain, however, that a mere agreement to admit a new member into a partnership, like an agreement to form a partnership, (*o*) however expressed, and on whatever consideration, would not of itself invest any person or persons with the * character * 13 of partners, although the breach of it might give an action for damages. (*p*)

For sufficient reason equity will decree specific performance of articles agreed on; but only where the partnership is for a definite period, or such decree is necessary to invest one of the partners with legal rights which he could not otherwise possess. (*pp*)

Whatever be the evidence offered to prove a partnership, it is said that parties denying it cannot give evidence of private conversation or correspondence to rebut that evidence. (*ppp*)

(*ll*) Pierce *v.* Whitley, 39 Ala. 172.

(*m*) See ch. 7, § 1.

(*n*) Fox *v.* Clifton, 9 Bing. 115. See Kingman *v.* Spurr, 7 Pick. 236; Alvord *v.* Smith, 5 id. 232; Cochran *v.* Perry, 8 Watts & S. 262. See also *post*, ch. 7, § 1.

(*o*) Wilson *v.* Campbell, 5 Gilman, 383; Howell *v.* Brodie, 6 Bing. N.C. 44.

(*p*) Figes *v.* Cutler, 3 Stark. 139; M'Neill *v.* Reid, 9 Bing. 68, 2 Moore & Scott, 89; Byrd *v.* Fox, 8 Mo. 574. See ch. 8, § 2.

(*pp*) Whitworth *v.* Harris, 40 Miss. 483; Freeman *v.* Smith, 2 Wallace, 160; Buxton *v.* Lister, 3 Atk. 383; Anonymous, 2 Ves. 629, 630; Birchett *v.* Bolling, 5 Munf. 442; Hibbert *v.* Hibbert; Collyer on Part. § 203. See *post*, ch. 7, § 7.

(*ppp*) Freeman *v.* Smith, 2 Wallace, 160.

We shall hereafter see that, in reference to transfer and to incoming partners, the courts pay great respect to that "*dilectus personarum*," by which partners, who are so much in the power of each other, may protect themselves from the danger of having that power pass into hands to whom they would not willingly intrust it. (*q*)

Every contract that is vitiated by fraud, or by coercion, is thereby avoided and annulled. This is certainly true of the contract of partnership; and, from the peculiar character of the relation of partners, and of their almost unrestricted capacity to do each other an injury, it may be thought that courts would be peculiarly watchful to require that this contract was formed deliberately and freely, and without deception or undue or wrongful influence. (*r*)

So, too, that the contract of partnership may be lawful, it must be made by competent parties; that is, by those who have a legal right to enter into it. And we shall hereafter see that competency to enter into partnership is almost or quite coextensive with a competency to transact business generally. (*s*)

It is sometimes important to determine when a partnership begins. Usually, this is determined by the contract of partnership. If not, it would probably be held as presumption of law that it began when the written articles were executed. (*t*) But even if in the contract of partnership it were expressly stipulated that it should have a retrospective effect, and that the partnership should begin a certain time before the date, it might bind the parties to it, for some purposes at least;
* 14 but could not make them * partners at the time stipulated, in reference to third parties, except from the date. (*u*)

(*q*) See ch. 7, § 1.

(*r*) Tattersall *v.* Groote, 2 Bos. & Pul. 131; *Ex parte* Broome, 1 Rose, 69; Green *v.* Barrett, 1 Sim. 45; Pillans *v.* Harkness, Colles P. C. 442; Hynes *v.* Stewart, 10 B. Mon. 429; Howell *v.* Harvey, 5 Ark. 270; Fogg *v.* Johnston, 27 Ala. 432. See *post*, ch. 14, subsection 1.

(*s*) See ch. 3.

(*t*) Howell *v.* Brodie, 6 Bing. N. C. 108; Aspinwall *v.* Williams, 1 Ohio, 38; Austin *v.* Williams, id. 282; Grant *v.* Watts, 10 Paige, 82; Ingraham *v.* Foster, 31 Ala. 123; Beaman *v.* Whitney, 20 Me. 413.

(*u*) Thus, where A. & B., who were already in partnership, agreed on the 24th of June to become partners with C., and it was farther agreed that the new partnership should be considered as commencing from the 18th of May preceding; *held*, that C. was not liable as a partner upon a bill of exchange

If the agreement of copartnership is executory and conditional, no partnership is created by it until all the conditions are fulfilled. (*v*)

In one case, in which the partnership was unlawful if entered upon on the day of the date of the articles, and lawful if it began three months afterward, the court held it to be an absolute presumption of law that it began on the day of the date, although nothing in the articles specially indicated it. And the court refused evidence that the bargain and intention of the parties was not to enter upon the partnership until it should be legal. This case we do not think law; although it would be proper to exclude evidence which contradicted an express provision. (*w*)

Where the partnership was not formed by any express agreement, written or oral, but implied by law from certain joint transactions, it would be held to begin when these transactions took place, or perhaps when the agreement to enter into them was formed. (*x*) Thus, if there were such a joint buying

indorsed by the firm of A. & B. upon the 19th of May. Vere *v.* Ashby, 10 B. & C. 288; Wilsford *v.* Wood, 1 Esp. 182. See Dyke *v.* Brewer, 2 Car. & K. 828. On the other hand, if A., B., and C. agree to enter into partnership on the 1st of January, and from that time regard themselves as partners, the partnership will be held to have commenced on that day, though the deed of partnership be not executed till the 18th of January. Battley *v.* Bailey, 1 Scott N. R. 143.

(*v*) Fox *v.* Clifton, 6 Bing. 776; Dickinson *v.* Valpy, 10 B. & C. 128; Murray *v.* Richards, 1 Wend. 58. See further Ward *v.* Thompson, 1 Newb. Adm. 95; Bisset on Part., part 2d, ch. 6; Story on Part. § 150; Avery *v.* Louve, 1 La. Ann. 457; *post*, ch. 18. See Peck *v.* Thomas, 29 Eng. L. & Eq. 276.

(*w*) Williams *v.* Jones, 5 B. & C. 108. See Dix *v.* Otis, 5 Pick. 38; Vassar *v.* Camp, 14 Barb. 356; Bird *v.* Hamilton, Walker Ch. 361. In this last case the contract of partnership was executed the 16th of May. The language imputed a partnership *in præsenti*. But, inasmuch as the business of the partnership could not be entered upon until the 1st of July, the court, regarding the situation of the parties, construed the partnership not to commence until that time.

(*x*) Gardiner *v.* Childs, 8 Car. & P. 345. The firm, C. & D., defendants, were printers. The present action was brought to recover of them the price of a certain amount of paper delivered to them by the plaintiffs, but at the order and upon the credit of the firm of A. & B., publishers. The plaintiffs, to prove the existence of a partnership between the defendants and A. & B. in certain publications for which the paper was furnished and used, put in evidence accounts between the two firms, determining their respective shares of the profits accruing from such publications. These accounts bore dates from January, 1836, to February, 1837. The paper was supplied in April and May, 1836. Upon this state of facts, Ld. Denman, C. J., left it to the jury to say whether, *at the time the goods in question were furnished*, the defendants were partners

*15 of property *with the intention of joint selling, as would make the parties partners in law as to their property or business, they would be partners, not only when the thing was bought, but they might become partners as to this purchase by their agreement to join and act, although no responsibilities as partners would rest upon them until something was done to carry the agreement into effect.

It may be well to remark, in this connection, that courts of common law cannot take cognizance of a large proportion of the cases which arise under the law of partnership. Nearly all of those which relate to the rights and obligations of partners *inter se* go into a court of equity. We shall hereafter see that one partner can sue another at law only in a few exceptional cases. And when the settlement of the affairs of a partnership is required, or the taking of an account, or the prevention or discontinuance of some wrongful act, or the protection or enforcement of a right by other means than damages for a breach of it, the parties necessarily resort to equity. Hence there is certainly no branch of commercial law (to which partnership emphatically belongs) that so often finds the common-law jurisdiction inadequate to its wants, and is therefore obliged to resort to equity for relief. As we go on, we shall endeavor to point out specifically, in reference to the various questions and conflicting claims which are frequently springing up under the law of partnership, the methods and measures of relief which equity administers.

in the concern upon whose credit they were supplied. The jury finding that they were, judgment was rendered for the plaintiffs. See Avery *v.* Louve, 1 La. Ann. 457.

CHAPTER III.

OF PARTNERS.

SECTION I.

WHO MAY BE PARTNERS.

THERE is nothing in this country to prevent any number of persons from entering into partnership. Nothing but their own convenience and pleasure determine this. (*a*)

As to personal competency, it may be said that any persons competent in law and in fact to transact ordinary business on their own account may enter into partnership for that purpose. For there is nothing in the *status* of partnership, which, on the one hand, confers a power to transact business on one who otherwise would have no power, or, on the other, restrains or diminishes the power in him who possesses it before or without partnership.

We have said competent in law and in fact, because there are incompetencies created by the law, or absolutely presumed, without any reference to the actual fact. (*b*) As in the

(*a*) But now, in England, by "The Companies Act" of 25 & 26 Vict. 1862, consolidating and amending former acts upon the subject, no partnership consisting of more than twenty persons, which has for its object the acquisition of gain, is allowed to carry on business, without forming a company by registration; and under the provisions of this act any seven or more persons may so associate, with or without limited liability, as they may elect and declare. This is the nearest approach to our system of limited partnership that has yet been made by the legislation of that country.

(*b*) In England, the statute 57 Geo. 3, ch. 99, § 3, rendered all spiritual persons incompetent *in law* to carry on, by themselves or their agents, "any trade or dealing for gain or profit," and of course thereby interdicted such persons from being partners for that purpose. Hall *v.* Franklin, 3 M. & W. 259. See 102 Vict. ch. 10. So also the law sometimes renders all persons who have not been qualified in a prescribed legal way, incompetent to exercise particular trades or professions. Thus, by 5 Eliz. ch. 4, persons were prohibited from following any manual art or occupation, who had not previously served an apprenticeship to the same. But one who,

*17 case of an *infant, who cannot lawfully do, the day before he is twenty-one, what he may do on that day. So a married woman is disabled at common law, although in fact she may have far greater business capacity than her husband. The recent changes in the law of married women, which in some of our States seem to give her all, or very nearly all, the rights and powers of a single woman, may extend to the right of becoming a partner in a trading firm; but we know no case in which this question is decided. An insane person is disabled by the fact of his insanity. And whether insanity exists, and in a sufficient degree to have this effect, must be a question of fact only. And some difficulty, to say no more, would attend the entering into a copartnership of a corporation as a member of the firm. (*c*) We will, however, look at some of these questions more specifically.

1. *Infants.*

Infants are persons under twenty-one years of age; and, for their own benefit and safety, the law considers them disqualified for the transaction of business. Their contracts or promises

though he had not been apprenticed, was a partner with a brewer, was held not within the statute, since he had not acted in nor personally exercised the trade. Reynard *v.* Chase, 2 Wils. 40. See 22 Geo. 2, ch. 46, § 11, an act to prevent unqualified persons from acting as attorneys or solicitors. *In re* Jackson, 1 B. & C. 270; *In re* Clark, 3 D. & R. 260; Hopkinson *v.* Smith, 1 Bing. 13; Candler *v.* Candler, Jac. 225; Sterry *v.* Clifton, 9 C. B. 110; Taylor *v.* Glassbrook, 3 Stark. 76. In Gilfillan *v.* Henderson, 2 Clark & F. 1, two solicitors had entered into partnership, one of whom could practise only in a superior court, the other only in an inferior court. By their agreement the profits of their general business were to be divided; each was to recommend clients to the other, and the existence of the partnership was to be kept secret. *Held*, that the agreement was illegal and void. See *In re* Woodward, 4 Johns. 289.

(*c*) As the whole power of a corporation is derived from its charter, it may well be questioned whether it could enter into a partnership for the transaction of a business different from the object for which it was chartered. And it seems that two or more corporations cannot consolidate their funds, or form a partnership, unless authorized by express grant, or necessary implication. Sharon Coal Co. *v.* Fulton Bank, 7 Wend. 412. It is a different question, whether a corporation may not render itself liable to third parties as a *quasi* partner, by its acts; and we know of no reason why this might not be the case. The subject was before the court in Holmes *v.* Old Colony R. R. Co., 5 Gray, 58; but, as the acts of the corporation were held not sufficient to constitute a partnership liability as to third parties, there was no direct decision upon the question whether a corporation could be held as partner.

for necessaries — such as shelter, food, raiment, and such other means of support and education as are proper for them — are valid and obligatory, because it is for their interest that they should be able to bind themselves for the things they must have, or suffer from the want of them. But the promise of an infant in * any business transaction is voidable by him; because it is not necessary that he should earn money by buying and selling. (*d*) * 18

The promise is voidable only (if made by an infant mentally and physically able to make it), and not, we think, in any case absolutely void, as it used to be called. (*e*) For any such

(*d*) 1 Rol. Abr. 729; Whittingham *v.* Hill, Cro. Jac. 494; Whywall *v.* Champion, 2 Stra. 1083; Dilk *v.* Keighley, 2 Esp. 480; Goode *v.* Harrison, 5 B. & Ald. 147; Van Winkle *v.* Ketchum, 3 Caines, 323; Smith *v.* Mayo, 9 Mass. 62; Mason *v.* Wright, 13 Metc. 306; Crabtree *v.* May, 1 B. Mon. 289. The contract of partnership is like all other mercantile contracts, and may be made by an infant for his own benefit, subject to his right to avoid it when he comes of age. Ibid.; Glossop *v.* Colman, 1 Stark. 25. Hence, an infant may be a partner in a mercantile house, his father supplying the capital; and if the transaction be a *bonâ fide* one, and the son be the real party in interest, and the father retain no power of withdrawing from the firm either the capital or the profits, an agreement that the firm shall account to the father as trustee for his son, for one-third profit of his son's capital, or any loss that may accrue, and be governed by his advice in all business matters, will not make the father a partner. Barklie *v.* Scott, 1 Hud. & Bro. 83. But, though an infant coming of age may avoid his contract, he cannot recover, of persons who have dealt with the partnership, money expended by him in its affairs, for which he has received and enjoyed a valuable consideration. Holmes *v.* Blogg, 8 Taunt. 508. But where A., an infant, made an agreement of copartnership with B., and paid to him a hundred pounds, to be forfeited if, when he came of age, the partnership deed was not duly executed by him, the jury finding that A. had paid the money on a fraudulent representation in B.'s balance sheet, A., attaining his majority and disaffirming the contract, was allowed to recover back the deposit. Corpe *v.* Overton, 10 Bing. 252. This last case differs from Holmes *v.* Blogg in many important features. The court, however, distinguish it from that case only upon the ground, that in the one the infant had, and in the other he had not, enjoyed a valuable consideration for the money he sought to recover back.

(*e*) The doctrine of the common law, that there are some contracts of an infant, namely, those which the courts can pronounce to be to his prejudice, which are absolutely void, is recognized and asserted in a very great number of cases. Keane *v.* Boycott, 2 H. Bl. 511; Bayley, J., in Thornton *v.* Illingworth, 2 B. & C. 826; Fisher *v.* Mowbray, 8 East, 330; Baylis *v.* Dineley, 3 M. & S. 477; Tucker *v.* Moreland, 10 Pet. 58; Vent *v.* Osgood, 19 Pick. 572; Lawson *v.* Lovejoy, 8 Greenl. 405; Rogers *v.* Hurd, 4 Day, 57; Pool *v.* Pratt, 1 D. Chip. 252; McGaw *v.* Marshall, 7 Humph. 121; M'Minn *v.* Richmonds, 6 Yerg. 9; M'Crillis *v.* How, 3 N. H. 348; Swasey *v.* Vanderheyden, 10 Johns. 33; United States *v.* Bainbridge, 1 Mason, 71; Fridge *v.* The

promise of an infant may be ratified by him after he is of full age. And this ratification may be direct and express,
* 19 or it may be implied by * his acts, or even his silence, or inferred by law from circumstances. In England, no ratification, after full age, binds an infant, unless made in writing and signed by him. (*f*) A similar statute exists in Maine. (*g*) It is not quite certain how this requirement would affect a ratification by a continuance of the partnership and business. If, for example, a young man of the age of twenty entered into a partnership, and at twenty-one took no notice of his having been an infant, but continued in the partnership and in the same business for a year or two more, and the firm was then called on to settle an account running through all these years, we doubt whether, under this statute, the infant would be permitted to draw a line between the items, and hold himself responsible only for those which were subsequent to his majority. In this country generally, one who was an infant may not only ratify after coming of age any promise to which there is no other objection than the fact of the previous infancy, but may ratify this by any conduct of an unequivocal character, which must be understood either as a ratification, or else as fraud or as gross negligence on his part. (*h*) But a mere

State, 3 Gill & J. 103; Ridgeley *v.* Crandall, 4 Md. 435; Cronise *v.* Clark, 4 Md. Ch. 403. But the doctrine of the text seems more sound in principle and more practical of application, and is supported by the later authorities. Williams *v.* Moor, 11 M. & W. 256; Fonda *v.* Van Horne, 15 Wend. 631; Breckenbridge *v.* Ormsby, 1 J. J. Marsh. 236; Scott *v.* Buchanan, 11 Humph. 468; Cummings *v.* Powell, 8 Texas, 80; Cole *v.* Pennoyer, 14 Ill. 158; Robbins *v.* Cutler, 6 Foster, 173; Weaver *v.* Jones, 24 Ala. 420; Hardy *v.* Waters, 38 Me. 450; Ferguson *v.* Bell, 17 Mo. 347; Strain *v.* Wright, 7 Ga. 568; 1 Am. Lead. Cas. 103; Taft *v.* Sergeant, 18 Barb. 320.

(*f*) 9 Geo. 4, ch. 14, § 5. In the construction of this statute, it has been held that "any written instrument signed by the party, which, in the case of adults, would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification." Harris *v.* Wall, 1 Exch. 122. See Mawson *v.* Blane, 10 Exch. 206. In Hartley *v.* Wharton, 11 A. & E. 934, the writing by which the ratification was alleged to be made was a letter, without date or address, containing a promise to remit within a short time, but mentioning no sum nor any particular debt. *Held*, nevertheless, that this was a ratification which satisfied the statute, and that the date, address, and debt might be proved by parol.

(*g*) Acts of Maine, 1845, ch. 166. See Thurlow *v.* Gilmore, 40 Me. 378.

(*h*) Martin *v.* Mayo, 10 Mass. 137; Whitney *v.* Dutch, 14 id. 457; Pierce *v.* Tobey, 5 Metc. 168; Orvis *v.* Kimball, 3 N. H. 314; Aldrich *v.* Grimes, 10 N. H. 194; Robbins *v.* Eaton, id. 561; Edgerly *v.* Shaw, 5 Foster, 514; Boy-

acknowledgment that the debt exists is not of itself a ratification of a promise to pay the debt. (*i*)

* If we suppose that an infant enters into a partnership, holding himself out by his declarations, or by the plain indication of circumstances, as an adult, and, after he comes of age, does not expressly withdraw or give any equivalent notice, persons dealing with the firm in the belief that the former infant was still a partner would hold him liable; because, whether he was a partner or not, he permitted the firm to use his credit, and he, and not an innocent third party, must suffer the consequences. (*j*) * 20

In general, an infant partner who comes of age, should, with no unnecessary delay, leave the firm, and declare himself not responsible for its debts, if he intends to take that course; for any considerable delay would bind him like a ratification, because it could be accounted for only by criminal neglect or fraud. (*k*)

den *v.* Boyden, 9 id. 519; Delano *v.* Blake, 11 Wend. 85; Bigelow *v.* Grannis, 2 Hill (N. Y.), 120; Taft *v.* Sergeant, 18 Barb. 320; Lawson *v.* Lovejoy, 8 Greenl. 405; Richardson *v.* Bright, 9 Vt. 368; Best *v.* Givens, 3 B. Mon. 72; Cheshire *v.* Barrett, 4 McCord, 241; Bobo *v.* Hansell, 2 Bailey, 114; Eubanks *v.* Peak, id. 497; Alexander *v.* Heriot, Bailey Eq. 223; Thomasson *v.* Boyd, 13 Ala. 419; Forsyth *v.* Hastings, 27 Vt. 646.

(*i*) Thrupp *v.* Wilder, 2 Esp. 628; Goodsell *v.* Myers, 3 Wend. 479; Millard *v.* Hewlett, 19 id. 301; Smith *v.* Mayo, 9 Mass. 62; Ford *v.* Phillips, 1 Pick. 202; Thompson *v.* Lay, 4 Esp. 48; Benham *v.* Bishop, 9 Conn. 330; Wilcox *v.* Roath, 12 id. 550; Hale *v.* Gerish, 8 N. H. 374; Robbins *v.* Eaton, 10 id. 561; Ordinary *v.* Wherry, 1 Bailey, 28; Alexander *v.* Hutcheson, 2 Hawkes, 535; Hindy *v.* Margarity, 3 Barr, 428.

(*j*) Goode *v.* Harrison, 5 B. & Ald. 147. Goode & Bennion, defendants below, had held themselves out as general partners in trade, especially by a joint purchase of goods of the plaintiff in April, 1818. At that time Bennion was an infant, though that fact was unknown to the plaintiff. There was evidence showing that Bennion did not intend to be a partner with Goode, except for the single transaction of April, 1818, and that he did not afterwards interfere with Goode's general business. In May following, he became of age; but no notice of his having ceased to be a partner was ever given by him. Subsequently to his coming of age, Goode bought more goods of Harrison in the name of the firm, and accepted a bill for them in the name of himself and Bennion. *Held*, that Bennion was liable on this bill; for, having shortly before he came of age represented himself as a partner, it was his duty to notify the plaintiff that he was not so, when he came of age, as otherwise he facilitated the commission of a fraud upon the plaintiff.

(*k*) See Holmes *v.* Blogg, 8 Taunt. 35; 1 J. B. Moore, 466. In March, 1816, the firm of A. & B. leased certain premises, for the purposes of their trade. A., an infant, in the presence of B., advanced one-half of the amount of the rent. For the other half, three

* 21 * It may be well to remark that the right of an infant to avoid his contract gives no right of avoidance what-

bills were drawn upon the firm, and accepted by A., in the names of himself and partner, the first bill payable in four months. In June, A. reached his majority, and immediately dissolved the partnership; but, though his name was taken from the door shortly afterwards, no notice was given of his avoidance of the lease till nearly four months afterwards. Dallas, J., said: "I agree that in every instance of a contract, voidable only by an infant on coming of age, the infant is bound to give notice of disaffirmance of such contract in reasonable time; and, if the case before the court were that simple case, I should be disposed to hold, that, as the infant had not given express notice of disaffirmance within four months, he had not given notice of disaffirmance in reasonable time." But it *seems* that notice of disaffirmance of an infant's contract may be dispensed with by the acts of the party to whom it would otherwise be due. The lessor, in this case, having, after the dissolution of the partnership, made a new arrangement with B., A.'s copartner, by which a part of the rent was remitted, and having, when the first bill became due, sued B. alone upon it, and having afterwards compromised the action and accepted from B. alone a surrender of the lease, and cancelled the other bills, all this without the privity of A., it was *held*, that there should be a new trial, in order that the jury might determine whether, upon these facts, notice of disaffirmance had not been waived. The case, however, was ultimately decided upon other grounds. 8 Taunt. 508. The *dictum* of Dallas, J., above quoted, that an infant must disaffirm his contract within a reasonable time after coming of age, or his silence will bind him like a ratification, is established law in the English courts, and has been approved by eminent judges in this country. Cork & Bandon R. R. Co. *v.* Cazenove, 11 Q. B. 935; Leeds & Thirsk R. R. Co. *v.* Fearnley, 4 Exch. 26; Northwestern R. R. Co. *v.* M'Michael, 5 id. 114; Dublin & Wicklow R. R. Co. *v.* Black, 8 Exch. 181; Richardson *v.* Boright, 9 Vt. 368; Kline *v.* Bebee, 6 Conn. 494; Scott *v.* Buchanan, 11 Humph. 468. But the weight of American authority cannot be said to be in favor of the proposition that mere neglect to disaffirm will of itself amount to a ratification. There must, beside, be positive action on the part of him who has come of age clearly indicating his intention to abide by the contract which he has made during his infancy. Thus, in Dana *v.* Stearns, 3 Cush. 342, B., an infant, and S. had been in partnership, which was, however, dissolved by mutual consent before B. came of age. B. sold out his share to S., took therefor the note of S. with security, but never expressed any purpose of repudiating the partnership. In an action brought against B. & S. as partners, upon notes given by them while in business together, and in consideration of merchandise sold and delivered to them, it was contended that B. had ratified the partnership after coming of age, and therefore the notes in suit, by retaining and attempting to enforce the note of S. above mentioned, which was given by S. not only for the amount of capital originally contributed by B., but also in addition for B.'s share of the profits realized by the firm during their continuance in business. But the court *held*, that no sufficient ratification was proved from these facts, and that B. was not liable for the partnership debts. See, to the same point, the note to the case of Dublin & Wicklow R. R. Co. *v.* Black, 8 Exch. 181, where the American authorities are reviewed. See also Jones *v.* Phœnix Bank, 4 Seld. 228; N. H. Mut. F. Ins. Co. *v.* Noyes, 32 N. H. 345; Stokes *v.* Brown, 4 Chand. 39. A plea of infancy to a note executed by an infant partner in

ever to the other contracting party, who is bound if the infant does not choose to avoid the contract. (*l*) The infant's privilege of avoiding his contracts extends to his legal representatives. (*m*)

* A fiat or decree of bankruptcy against an infant is not voidable only, but wholly void at law. (*n*) Equity, however, will not declare it void if he has induced persons to give him credit as an adult member of the firm, but will leave him to his remedy at law. (*o*) But the fact that his name is * 22

the name of the firm is not avoided by a replication that defendant had continued to be a partner for a year and more after he became of age, and had not during that time, nor for some years after, disaffirmed any note executed during his infancy, in the name of the firm. There should also be an averment that he had knowledge of the particular contract declared on, and that he was looked to as a party to it. Crabtree *v.* May, 1 B. Mon. 289. In Miller *v.* Sims, 2 Hill (S. C.), 479, an action was brought on a note signed by Sims in the name of Sims & Ashford. Ashford was, at the time of signing, a minor. After he came of age, there was evidence that he received moneys due the firm, and signed the firm name, but refused to have any thing to do with the note in question, and never ratified or confirmed it. The court *held*, that if Ashford, after coming of age, did in any manner concur in carrying on the partnership business, or received profits from it, it would amount to a ratification; and that, by affirming the partnership, Ashford recognized and affirmed the agency of Sims.

(*l*) Holt *v.* Ward, 2 Str. 937; Warwick *v.* Bruce, 2 M. & S. 205; Willard *v.* Stone, How. 22; Parker *v.* Barker, 1 Clarke Ch. 136; Rose *v.* Daniel, 3 Brev. 438; Voorhees *v.* Wait, 3 Green, 343; M'Ginn *v.* Shaeffer, 1 Watts, 412; Cannon *v.* Alsbury, 1 A. K. Marsh. 76.

(*m*) Hussey *v.* Jewett, 9 Mass. 100; Martin *v.* Mayo, 10 id. 137; Jackson *v.* Mayo, 11 id. 147.

(*n*) O'Brien *v.* Currie, 3 C. & P. 283; Belton *v.* Hodges, 9 Bing. 365. The fiat is void, because a minor's contracts of trade being voidable, he cannot be a bankrupt for debts which he is not obliged to pay. Ibid.; Rex *v.* Cole, 1 Ld. Raym. 443; Lord Eldon in *Ex parte* Adam, 1 Ves. & B. 494; *Ex parte* Moule, 14 Ves. 602. Hence also a joint commission of bankruptcy against a firm, one of the members of which is an infant, will be superseded. *Ex parte* Henderson, 4 Ves. 163; *Ex parte* Barwis, 6 Ves. 601. But where a statute provides that an adjudicated bankrupt, to test the validity of the commission, must show cause before the commissioner within seven days after the adjudication; or, to dispute or annul the fiat, must commence proceedings within twenty-one days after the advertisement of the bankruptcy, — a partner, adjudged a bankrupt while an infant, cannot after the lapse of the prescribed period maintain a petition praying, on the ground of his infancy, to have the adjudication and fiat annulled; there being in this respect no exception made of infants in the statute. *Ex parte* West, 2 De Gex, Mac. & Gor. 198.

(*o*) *Ex parte* Watson, 16 Ves. 265. The Lord Chancellor delivered his opinion as follows: "As it appears in this case that the petitioner held himself forth to the world as an adult, and *sui juris*, and traded in that character, and contracted debts to a considerable amount for two years previous to the commission, and as this petition is opposed on behalf of the creditors, I will make no order; but leave the bank-

used in the firm is not of itself sufficient to prevent equity from annulling the same. (*p*)

If a contract be made with a firm, one of the members being an infant, and repudiating his own liability, it seems to be doubted whether the contract can afterwards be treated as a contract made with the other partners. (*pp*) We should say, however, that it may. The technical rules of pleading in England require that if an action be brought against an infant (or one who was an infant at the time of the promise) and others, and infancy is pleaded, the plaintiff cannot proceed against the others, but he may bring a new action against them
* 23 alone. (*q*) And if he brings an action * originally against them alone, and the non-joinder of the infant is pleaded in abatement, the infancy is a sufficient replication, (*r*) although a ratification by him who has been an infant would be a good rejoinder. (*s*) In Massachusetts, New York, New Hampshire, Indiana, and Maine, it has been held that an action brought against all may be continued against the other parties when one of them pleads infancy. (*t*) We know of no dis-

rupt to his action at law, if he shall think proper so to do. I consider him no more entitled to any favor or assistance than a *feme covert* is who lives apart from her husband, and holds herself out as a *feme sole*, and contracts debts, is entitled to any summary relief from the judges at common law; who always leave a woman of that description to make the best she can of her plea of coverture in any action brought against her, and constantly refuse to interfere so as to afford her any summary relief."

(*p*) As where A. takes B., his minor son, sixteen years old, into partnership. Though the names of A. & B. are put over the door of their place of business, B. is not by that circumstance so held out to customers as an adult partner as to lose the right of having annulled a joint fiat of bankruptcy issued against the firm of A. & B. *Ex parte* Lees, 1 Deason, 705.

(*pp*) See Story Part. § 255.

(*q*) Chandler *v.* Parkes, 3 Esp. 76; Jaffray *v.* Frebain, 5 id. 47.

(*r*) Burgess *v.* Merrill, 4 Taunt. 469; 2 Vin. Ab. 68.

(*s*) Gibbs *v.* Merrill, 3 Taunt. 307. But such rejoinder must be supported by proof of a ratification made before suit brought. Thornton *v.* Illingworth, 2 B. & E. 824. In an action for a partnership debt, an infant partner must be made co-plaintiff. Teed *v.* Elworthy, 12 East, 210; Kell *v.* Nainby, 10 B. & C. 20.

(*t*) Woodward *v.* Newhall, 1 Pick. 500; Tuttle *v.* Cooper, 10 id. 281; Hartness *v.* Thompson, 5 Johns. 160; Robertson *v.* Smith, 18 id. 478; Morton *v.* Croghan, 20 Johns. 123; Judson *v.* Gibbons, 5 Wend. 224; *Ex parte* Nelson, 1 Cow. 424; Cutts *v.* Gordon, 13 Me. 474. The same is the rule in Indiana. Kirby *v.* Cannon, 9 Ind. 371. So, too, in New Hampshire. Gay *v.* Johnson, 32 N. H. 167. See also Wamsley *v.* Lindenberger, 2 Rand. 478; Cole *v.* Pennell, id. 174; Barlow *v.* Wiley, 3 A. K. Marsh. 457; Slocum *v.* Hooker, 13 Barb. 536.

tinctly opposite ruling, and should expect that this would be recognized as the American rule.

2. *Married Women.*

A married woman is, by common law, incapable of trade, and therefore of entering into partnership. But, by the "custom of London," married women may sometimes be sole traders, (*u*) and the courts of this country are quite indulgent in permitting women whose husbands have deserted them — voluntarily, or by compulsion of law — to enter into business for their support. And we know no reason whatever why any married woman who is capable of being a sole trader may not also enter into a commercial partnership. (*v*)

(*u*) Langham *v.* Bewett, Cro. Car. 68. In this case, the custom of London was read, to wit: "That a *feme sole* merchant is where the *feme* trades by herself in one trade, with which her husband doth not meddle, and buys and sells in that trade." But the city courts only, not the superior courts at Westminster, take notice of this custom, so that a *feme covert* cannot, by virtue of it, sue or be sued in the latter without her husband. Caudell *v.* Shaw, 4 T. R. 361; Beard *v.* Webb, 2 B. & P. 93; Cosio *v.* De Bernales, 1 C. & P. 266, note.

(*v*) By the law of England a wife may act as a *feme sole*, if her husband has been banished, or has abjured the realm, or been transported, or if he has professed the Catholic religion. Co. Litt. 132 b, 133 a; Lean *v.* Schutz, 2 W. Bl. 1195; Corbett *v.* Poelnitz, 1 T. R. 5; Marshall *v.* Rutton, 8 id. 545; Carroll *v.* Blencow, 4 Esp. 27; Marsh *v.* Hutchinson, 2 B. & P. 231; *Ex parte* Franks, 1 Moore & S. 1. So, also, if her husband is an alien, who has never resided in England. Deerly *v.* Mazarine, 1 Salk. 116; De Gallou *v.* L'Aigle, 1 B. & P. 357; Marsh *v.* Hutchinson, 2 id. 226; Farber *v.* Granard, 4 id. 80; Walford *v.* De Pienne, 2 Esp. 554; Franks *v.* De Pienne, id. 587; Kay *v.* Pienne, 3 Camp. 123. The principle upon which the English courts have proceeded in these cases is, that, in the view of the law, the husband has no civil existence, and that the wife is therefore in a state of civil widowhood. In this country, the same exceptions to the disability of married women to make and to be bound by contracts have been recognized by the courts. Gregory *v.* Paul, 15 Mass. 31; Robinson *v.* Reynolds, 1 Aik. 174; Cornwall *v.* Hoyt, 7 Conn. 420; Wright *v.* Wright, 2 Desau. 244; Boyce *v.* Owens, 1 Hill (S. C.), 8; M'Arthur *v.* Bloom, 2 Duer, 151. And, if a man has never lived in that State of the Union in which his wife resides, he is, so far as that State is concerned, an alien, and his wife is treated as a *feme sole*. Abbot *v.* Bayley, 6 Pick. 89. But American courts have also gone farther, and have held a separation from and abandonment of the wife, coupled with an intent to renounce *de facto* the marital relation, to operate like an abjuration of the realm, and to invest the wife with the rights of a *feme sole*. And in some cases slight circumstances have been considered sufficient to constitute such desertion and renunciation. Bogget *v.* Frier, 11 East, 301; Gregory *v.* Pierce, 4 Metc. 478; Rhea *v.* Rhenner, 1 Pet. 105; Valentine *v.* Ford, 2 P. A. Browne, 193; Bean *v.* Morgan, 4 McCord, 148; Love *v.* Moynehan, 16 Ill. 277; Krebs *v.* O'Grady, 23 Ala.

* 24 * The whole law of married women is, in this country, or in many of our States at least, in a transition condition; and it is not easy to ascertain or to define it. There is everywhere a strong disposition to escape from the old feudal doctrine which almost merged the existence of the wife
* 25 in that of the husband. (*w*) * We do not always

726. In Massachusetts, a wife divorced *a mensa et thoro* may sue and be sued as a *feme sole*. Dean *v.* Richmond, 5 Pick. 461; Pierce *v.* Barnham, 4 Metc. 303. Otherwise in England. Lewis *v.* Lee, 3 B. & C. 291.

(*w*) Legislation in this country has made the most important and extensive additions to the powers of married women. So early as 1718, in Pennsylvania, and 1744, in South Carolina, the privileges of *feme sole* traders by the custom of London were extended to married women in those States, which were then colonies. See Burke *v.* Winkle, 2 S. & R. 189; Jacobs *v.* Fatherstone, 6 W. & S. 346; Newbiggin *v.* Pillans, 2 Bay, 462; McDowall *v.* Wood, 2 Nott & McCord, 242; Stark *v.* Taylor, 4 McCord, 413. Within the last few years, however, the legislatures of very many States have made much greater innovations upon the law of husband and wife. The various statutes differ of course in their details, and are changing every year. Their exact nature and effect remain to be determined by time and adjudication. But, in general, their object and scope are the same, and may be said to be to give to a married woman the rights of a *feme sole*, when there has been a *de facto*, though not legal, dissolution of the marriage tie, as by the desertion of the husband, or his imprisonment, or by a divorce *a mensa et thoro;* and, secondly, to give her those rights with respect to all the property which she may possess in her own right at the time of her marriage, or may afterwards acquire by her own exertions, or otherwise independently of her husband. See Rev. Stat. of Maine, 1857, ch. 61; Colby *v.* Lamson, 39 Me. 119; Oxnard *v.* Swanton, id. 125; Rev. Stat. of New York (4th ed.), 1852, p. 331; Berley *v.* Rampacher, 5 Duer, 183; Freeman *v.* Orzer, id. 476; Rev. Code of North Carolina, ch. 39, § 13 ch. 56; Acts of Pennsylvania of 1848, 1850, and 1851; Laws of New Jersey, 1852, ch. 41; Gen. Stat. of Mass. ch. 108; Rev. Stat. of Louisiana, 1856, p. 560; Rev. Stat. of Rhode Island, 1857, chs. 135, 136; Acts of Vermont, 1847; Rev. Stat. of Connecticut, ch. 1, § 7, 1849; Act of 1849, ch. 20; Acts of Alabama, 1850; Laws of Texas, ch. 79, 1848; Acts of Maryland, 1853, ch. 245; Anger *v.* Price, 9 Md. 552; Practice Act of California, 1851; Snyder *v.* Webb, 3 Cal. 3; Cawshaw *v.* Cawshaw, id. 312; Wheeler *v.* Jennings, 17 B. Mon. 476; Rev. Stat. of Michigan, 1846, ch. 85, §§ 25, 26; Session Laws, 1855, p. 420; Markham *v.* Markham, 4 Gibbs, 305; Brown *v.* Fifield, id. 322; Dalton *v.* Murphy, 30 Mo. 59; Lee *v.* Bennett, 32 id. 119; Laws of Wisconsin, 1850, ch. 44; Rev. Stat of Indiana, p. 320; Acts of 1853, p. 57, § 5; McCarty *v.* Mewhinney, 8 Ind. 513.

In equity, also, it is the English doctrine, that, where property is settled upon a married woman to her separate use, she has complete *jus disponendi*, and, as far as that property is concerned, is competent to act in all respects as a *feme sole*, unless express restrictions are prescribed by the deed of settlement. The courts of chancery will enforce all her engagements against such property, real or personal. Thus, a *feme covert*, with property settled to her separate use, renders it liable, by accepting a bill of exchange, Stuart *v.* Kirkwall, 3 Madd. 387; or by making a promissory note, Bulpin *v.* Clark, 17 Ves. 365; Field *v.* Sowle,

remember, however, that the opposite extreme of wrong is not necessarily right. It is undoubtedly well to give a wife a more secure possession of and a better control over her property than she enjoys at common law. But if some of the changes are made which are from time to time pressed upon legislatures, or indeed if some of the laws now existing are carried out to the full extent of their language, we do not know why a wife might not enter into a commercial partnership with her husband, and he and she constitute a firm, as seems to be the case in * some parts of Continental * 26 Europe. (*x*) But we do not know that any law has been enacted of which it can be presumed that this was its purpose. And if a single woman was a member of a firm, — which she certainly may be, — we have no doubt that what we consider the established principle, by which her marriage dissolved the partnership, would prevail, generally at least, in this country. (*y*)

4 Russ. 112. In New York, the rule in equity was substantially the same, till changed by the Revised Statutes of that State, regulating trusts. Noyes *v.* Blakeman, 3 Sandf. 531. But the courts of this country generally appear to have adopted an opposite rule, and to incline to the position that a married woman has no power over her separate estate that is not plainly given her by the instrument creating such estate. See 1 Lead. Cas. Eq. 324, 343, where the whole subject is discussed and the principal authorities collected. Also, 2 Kent Com. (9th ed.) pp. 152–164; Dobbin *v.* Hubbard, 17 Ark. 189; Whitesides *v.* Cannon, 23 Mo. 457; Lillard *v.* Turner, 16 B. Mon. 374; Burch *v.* Breckinbridge, id. 482. In these instances, at law and in equity, married women may bind themselves by their contracts, and of course by those made in the way of trade. Wherever they have this general power, it would seem to follow, as suggested in the text, that they also have the power to enter into a commercial partnership. Where a *feme covert* entered into agreement of partnership, providing for its duration beyond the death of her husband, and this agreement was executed, and the partnership continued beyond her husband's death until her own, it was *held*, that the copartnership related back to the execution of the articles, so as to give all parties the same rights and advantages as they would have been entitled to if the *feme covert* had been a *feme sole* at the date of their execution. Everit *v.* Watts, 10 Paige, 82. [Married women may be partners in Ohio, Swasey *v.* Antram, 21 Ohio St. 87; in Illinois (with her husband), *Re* Kinkead, 3 Biss. (U. S. C. Ct.) 405, and note; in Virginia, Penn *v.* Whitehead, 17 Gratt. (Va.) 503. But not in Maryland, Bradstreet *v.* Baer, 41 Md. 19; nor in Massachusetts, Todd *v.* Clapp, 118 Mass. 495.] But the vesting in the husband of his wife's shares in a joint-stock company, so as to impose upon him the liabilities of a partner, must always be subject to the provisions of the original deed constituting the company, those provisions being in fact the terms upon which the members of the partnership consent to the admission of a new member.

(*x*) As in Spain, Cosio *v.* De Bernalles, Ryan & M. 102, 1 Car. & P. 266.

(*y*) Watson on Part. 384; Gow on

There are kinds of partnership, as joint-stock companies and the like, in which a partner may only own stock or shares, and take no part whatever in the active management of the concern. We know nothing to prevent a wife from holding such stock or shares; but we think her ownership — or partnership, if it should be so called — would be that of her husband, and that upon him would rest generally all the liabilities and obligations of a partner. (*z*) So, if a man's wife inherited an interest in a partnership, and he, instead of having the accounts settled, and the interest withdrawn, as he might do, permitted it to continue in the business, this would make him a partner, even without his actually withdrawing and appropriating funds. It certainly would have this effect wherever the common law so far prevailed that all her share of the profits were at once his. If, however, the property or interest were given to trustees for the sole benefit of the wife, free from any right or control of
* 27 the husband, then the mere fact of its * continuance in the business would not render him liable as partner, although it would probably cast this responsibility on the trustees; as otherwise it would be a kind of limited partnership, without

Part. 225. See *post*, ch. 12, § 5. And see Brown *v.* Jewett, 18 N. H. 230.

(*z*) Gow on Part. 2. In Dodgson *v.* Bell, 5 Exch. 57, the question was, whether the defendant was a partner in a joint-stock banking company in which, before and at the time of his marriage, his wife was a legally registered owner. After their marriage, the shares had continued to stand in the maiden name of defendant's wife, and she had received dividends and paid calls in respect of them, though without the knowledge of her husband, who never in any way meddled with them. The company's deed of settlement provided, that the husband of a female shareholder should not, merely in respect of his wife's shares, become a member of the company, but that he must first comply with certain conditions. The defendant not having fulfilled these conditions, it was *held*, that he was not a member against whom a *sci. fa.* to levy execution under Stat. Geo. 4, ch. 46, § 13, could issue. The same was held in Ness *v.* Angas, 3 Exch. 806, where the defendant's wife had bought shares after her marriage, with the consent of her husband, but out of the proceeds of her own estate; and this although her husband had received some of the dividends, signed receipts therefor as her agent, and attended company meetings, at which only shareholders were entitled to be present. It is to be observed, that, in this last case, upon the authority of which Dodgson *v.* Bell was decided, great stress is laid by the judges upon the fact that the remedy attempted to be enforced against the defendant, as a partner by virtue of his wife's interest, was an extraordinary statutable remedy. In both these cases the question was as to who were partners *inter se*, and not as to who were partners with respect to third persons. *In re* Keene's Executors, 3 De Gex, Mac. & Gor. 272.

the precautions and safeguards of the law on that subject. And if the law of the State where the case occurred gave to the wife, so far as her property was concerned, the *status* of a single woman, she might then be a partner.

3. *Of Aliens.*

An alien friend can be a partner in a commercial house; for there is nothing to prevent his holding any personal property, or in bringing and maintaining or defending any suits. (*a*) If the property of the firm were in part or in whole real estate, a question might arise. If the estate was in a country in which aliens could not hold land, the legal title certainly could not be in him; but we think that courts of equity would, in that case, hold the partners possessing the legal title as trustees for the partnership. They would certainly do this where one of many partners alone holds the title, and there were no aliens; and we see no sufficient reason why they should not, if one or more of the *cestui que trusts* were aliens. (*b*)

The rule is quite otherwise as to alien enemies. Here partnership is impossible. (*c*) And if there be a partnership with an alien friend, and war breaks out between the countries, it entirely suspends the partnership. From the language sometimes used, it might be inferred that a war would terminate and annul such partnership altogether; (*d*) and it might have this effect in many cases. But where the terms and business and state of affairs of the partnership were such that an entire suspen-

(*a*) Co. Litt. 129 b.

(*b*) See *post*, ch. 11.

(*c*) The reason is, that the existence of a state of hostility between two countries renders illegal all commercial intercourse between their citizens. Bristow *v.* Towers, 6 T. R. 35; Potts *v.* Bell, 8 id. 548; Willison *v.* Patteson, 7 Taunt. 439; The Hoop, 1 Rob. Adm. 196; The Indian Chief, 3 id. 22; The Jonge Pieter, 4 id. 79; The Franklin, 6 id. 127; *Ex parte* Boussmaker, 13 Ves. 71; Griswold *v.* Waddington, 15 Johns. 57, 16 id. 438; The Rapid, 8 Cranch, 155; The Julia, 1 Rob. Adm. 181; Scholefield *v.* Eichelberger, 7 Pet. 585; The San Jose Indiano, 2 Gall. 268. See upon this subject a learned note to the case of Clemontson *v.* Blessing, 11 Exch. 135.

(*d*) See Griswold *v.* Waddington, 15 Johns. 57; 16 id. 438. [A commercial partnership between citizens of the respective belligerents was dissolved by the late rebellion. Woods *v.* Wilder, 43 N. Y. 164. But the general doctrine of the text seems to be upheld by the weight of modern authority. Kershaw *v.* Kelsey, 100 Mass. 561; Cohen *v.* N. Y. Life Ins. Co., 50 N. Y. 610. See also Mutual Benefit Life Ins. Co. *v.* Hildyard, 37 N. J. Law, 444, where the cases upon the effect of war upon the abrogation of contracts are fully collected; N. Y. Life Ins. Co. *v.* Statham, 93 U. S. 24.]

sion of all rights and intercourse during the war would still leave the partnership in a condition to go on as before when the war ended, we should say that the partnership revived by peace, and did not need to be created anew.

* 28 * No alien enemy can bring any action in any court of the hostile country. (*e*) And this rule has been applied to a citizen then resident in a foreign country, on the ground that if he prevailed, and funds in satisfaction of his judgment were remitted to the foreign country, it would be a strengthening of the enemy. (*f*)

There is nothing to prevent a firm consisting wholly of aliens from having an agency in this country, and bringing any personal actions. Even if husband and wife form a commercial partnership in a foreign country in which such a partnership could legally exist, it would be difficult to say that they could not maintain an action together, in this country even as joint plaintiffs, however unusual such a thing might be. (*g*)

4. *Of the Insane and Persons under Guardianship.*

A fatuous or insane person could neither transact business on his own account nor as a partner. The degree of mental incapacity which should have this effect is hardly capable of definition; and the question whether it existed might be a difficult question of mixed law and fact. So, if one were generally sane, with attacks of insanity, or generally insane, with lucid intervals, it might be difficult to apply the rule; (*h*) but the rule itself certainly must be that no one is incapacitated from becoming a partner who is able to transact business of his own.

(*e*) Co. Litt. 129 b; Anthon *v.* Fisher, Dougl. 649, note; Brandon *v.* Nesbitt, 6 T. R. 23; Willison *v.* Patteson, 7 Taunt. 439; Griswold *v.* Waddington, 15 Johns. 57, 16 id. 438; Hoare *v.* Allen, 2 Dallas, 102. And the disability to sue attaches to an alien carrying on trade in an enemy's country, though he resides there also as consul of a neutral country. His individual character for purposes of trade is not merged in his national character. Albretcht *v.* Sussman, 2 Ves. & B. 323. The wife of an alien enemy is also disabled from suing in her own name on a contract made either before or during coverture. De Wahl *v.* Braune, 1 Hurl. & Nor. 178.

(*f*) M'Connell *v.* Hector, 3 B. & P. 113; O'Mealey *v.* Wilson, 1 Camp. 482; Roberts *v.* Hardy, 3 M. & S. 533; The Julia, 8 Cranch, 181; Griswold *v.* Waddington, 16 Johns. 438.

(*g*) See ch. 9, § 1.

(*h*) See the impressive remarks of Lord Chancellor Thurlow, in Attorney General *v.* Pamther, 3 Bro. Ch. Rep. 441.

Indeed, it might perhaps be said that one with a less measure of intellect might become a partner, because he would have the assistance and protection of others, and so be guarded against his own imbecility.

* To those under guardianship as spendthrifts or otherwise, or whom habitual intoxication has enfeebled and stultified, a similar rule must apply. (*i*) They are incompetent to transact business on their own account, and therefore incapable of entering into a commercial partnership. (*j*) * 29

5. *Of Corporations.*

The question has arisen in one or two cases whether a corporation, considered as a person, may become a partner, either with another corporation or with individuals. We have alluded to this already. Perhaps no other general rule on this subject can be stated than that a corporation may incur the liability of a partner as to third persons, although, on general principles, it would be inconvenient, if not impossible, for a corporation, which is only a *legal* person, to enter into a full copartnership, either with another *legal* person or with natural persons. (*k*)

(*i*) Menkins *v.* Lightner, 18 Ill. 282; Mansfield *v.* Watson, 2 Clarke, 111. So, an agreement to form a partnership would clearly be avoided, by proof that at the time it was made one of the parties "had not an agreeing mind," through *temporary* intoxication. Pitt *v.* Smith, 3 Camp. 33; Fenton *v.* Holloway, 1 Stark. 126. See Lightfoot *v.* Heron, 3 Younge Exch. 586.

(*j*) See further, on the subject of persons of insufficient mind to contract, 1 Fonbl. Eq. b. 1, ch. 2, § 3; 1 Story Eq. ch. 6, § 229, et seq.; 1 Pars. Cont. (5th ed.) b. 1, ch. 20; 2 Pothier on Obligations, App. No. 3, p. 23.

(*k*) In Sharon Canal Co. *v.* Fulton Bank, 7 Wend. 412, the court say: "It cannot be necessary to decide whether it is in the power of the two corporations, who are the plaintiffs, to consolidate their stock or to form a partnership. General principles are against the power of corporations to do such acts. They have no powers but such as are granted, and such as are necessarily incident to the grant made to them. Corporations at common law have certain powers, but not such as would authorize the forming of a partnership, or the consolidation of two corporations into one." In Catskill Bank *v.* Gray, 14 Barb. 479, one of the questions presented was whether a corporation could be a partner with an individual even as to liability. The language of the court is: "Strictly, perhaps, corporations should be and are restricted from contracting partnerships with individuals or corporations, and as between the parties to the contract, acting upon equal knowledge, a question of validity might be raised; but a corporation may contract with an individual in furtherance of the object of its creation, the effect of which contract may be to impose upon the company, as respects the community, the liabilities of a partner. I cannot think that a corporation may so shape its contracts, relating to the business

SECTION II.

OF THE KINDS OF PARTNERS.

Different names are given to partners, describing their respective relations to the partnership. The principal names are: 1. Ostensible, or Public. 2. Secret, or Unknown. 3. Nominal. 4. Silent. 5. Dormant. 6. Retiring. 7. Incoming. 8. General. 9. Special.

1. *Ostensible or Public Partners.*

This name indicates that the partner is "shown forth" to the world as one. If this is done with his own consent, all the liability of a partner attaches to him. There is no special way of holding such partner forth. It may be done by having his name in the firm or style of the partnership, or on the signs at the door, or by advertisement, or by circular letters. (*l*) Indeed, we apprehend that if a partner generally unknown is made known as such in any way to any one man, with his own consent, he is, so far as that man is concerned, an ostensible partner in every legal aspect and liability, as much as if advertised to the world. In this sense, therefore, there would be a difference between the words "ostensible" and "public," — the latter meaning shown as a partner to all the world, — although these two words are commonly used as synonymous.

2. *Secret or Unknown Partners.*

He is a secret partner who keeps himself concealed from the public, and from all the customers of the partner-

for which it was incorporated, as to share jointly with an individual in the profits of such business; subtract its interest in the profits from the fund on which the creditors of the concern had a right to rely for the payment of the debts due to them; and, when called upon by such creditors, be permitted to escape liability altogether, on the ground that the profits were realized as the partner of an individual, which relation the corporation could not legally occupy. I know of no sound reason why a corporation, more than a natural person, who participates in the profits as such of a particular business in which it may lawfully engage, should not be holden to the public for losses." See Marine Bank *v.* Ogden, 29 Ill. 248.

(*l*) Partners whose names are not expressed in the firm, but who are simply indicated by the word "Co.," are not dormant, but ostensible, partners. Goddard *v.* Pratt, 16 Pick. 428.

ship. (*m*) We *shall hereafter see that neither the *31
word "Co.," nor any other public designation of a co-partnership is necessary to bind all the partners. But this important distinction is to be taken: A partner is liable *either* because he is one in fact, *or* because he holds himself out or suffers himself to be held out as one. In the latter case, he is liable whether actually a partner or not, as we shall presently see. But, in the former case, he is not liable, unless it can be shown that he is actually a partner. If he is, he has gained nothing by being secret. Of course, so long as he is undiscovered he is safe: but as soon as he is found to be a partner, even if this be not until after an action has been brought against the other partners, he becomes liable; because, although he added no credit to the firm, and permitted no debt to be incurred on his credit, he is equally liable as if he had done this, from the mere fact that he shared the advantages of the partnership.

If a secret partner is announced as a partner to a customer, without his own consent or connivance or ratification, his rights are wholly unaffected by the customer's knowledge, and depend entirely upon the fact of his partnership. Not so, as we have seen in the preceding subsection, if he permits himself to be made known as a partner to a customer.

3. *Nominal Partner.*

Every ostensible partner is a nominal or known partner; but by this designation is usually meant, that the partner is *only* nominally one. (*n*) That is, he is so held forth as a partner, with his own consent, by any of the means usually employed for that purpose, as to make him liable as a partner on the ground that he has given his credit to the firm, and authorized engagements on his account. (*o*) It follows, there-

(*m*) United States Bank *v.* Binney, 5 Mason, 185.

(*n*) *Ex parte* Chuck, 8 Bing. 469. See Currier *v.* Silloway, 1 Allen, 19; Lindsey *v.* Edminston, 25 Ill. 359; Jacobsen *v.* Hennekenius, 1 Bro. P. C. 432; Fox *v.* Clifton, 6 Bing. 795; Hicks *v.* Cram, 17 Vt. 449. Hence one who is merely a nominal partner with another man may be called by him as witness. He is not incompetent on the score of interest. Parsons *v.* Crosby, 5 Esp. 199; Mawman *v.* Gillett, 2 Taunt. 327.

(*o*) The ground of the liability of a nominal partner is thus stated in a leading case, Waugh *v.* Carver, 2 H. Bl.

*32 fore, that if a person * suffers himself to be regarded as a partner by any customer of the firm, to him he is liable as if he were one, although he is in fact no partner, and not generally supposed to be one. The nominal partner is the converse of the secret partner.

4. *Silent Partner.*

This name is properly and generally applied to those who take no active part whatever in the business of the firm, and exercise none of the rights of a partner, except that of receiving their share of the profits from time to time. He is a silent partner, whether his name be made known in any way as a partner or not. There is, however, a very common use of the word "silent," which differs somewhat from that above stated. It seems to be thought that he only is a silent partner who is silent to the world in respect to his interest in the firm, as well as silent within the firm in its transaction of business. In this sense, a silent partner is one who is both inactive and unknown. And there are those who go so far as to think the silence to

235: "A case may be stated, in which it is the clear sense of the parties to the contract that they shall not be partners; that A. is to contribute neither labor nor money, and, to go still farther, not to receive any profits. But, if he will lend his name as a partner, he becomes as against all the rest of the world a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing." So in *Ex parte* Watson, 19 Ves. 461, Lord Eldon says: "There is a wide difference between a dormant and nominal partner. The former is liable in respect of the profits; . . . but if one, retiring or coming into the trade, suffers his name to be used, it is of no consequence, whether he has a salary, or sum of money, to be paid by others, or to be got out of the profits. It is the use of the name that makes him liable, as one of the persons by and to whom every thing is bought and sold." So, in Hicks *v.* Cram, 17 Vt. 449, the court say: "It is the representing one's self, or suffering one's self to be represented, as a partner, that creates a liability to third persons; and this is sufficient to create a liability, notwithstanding the truth should prove to be, that the person so suffering himself to be held out as partner, in fact was not so. This is in order to preserve good faith and prevent fraud, and is almost the only ground of an estoppel *in pais*. If one man has made a representation which he expects another may or will act upon, and the other does in fact act upon it, he is estopped to deny the truth of the representation. So, too, equally, when one remains silent, and suffers another to make the representation."

the world to be the main thing, understanding by the phrase "silent partner" one who is not known as such, whether active or otherwise; thus making the word "silent" synonymous with the word "secret." We prefer *the definition we have first above given, as the most reasonable, and as that which is best sustained. *33

5. *Dormant Partner.*

This phrase also is used in somewhat different senses. Indeed, there is much confusion and inaccuracy in the common use of the three words, — "secret," "silent," and "dormant." Many use this word as if it meant only unknown and secret; and apply the designation of dormant or sleeping to partners whose names are concealed, however awake and active they may be in the business of the firm. Others consider the word as properly applied to those only who are wholly inactive in the business, whether known to have an interest or not. We think, however, the word implies both the qualities of secrecy and inactivity. (*p*) It seems to be most common and most con-

(*p*) These two qualities are attributed to the dormant partner in the following expression of the difference between a dormant and an open partnership. "It seems to me to be this: when the names of the partners do or do not appear in their accounts, their advertisements, or their paper; when the business is carried on in the name of all, it is open; but, *if any are kept back*, it is *dormant*: that the knowledge which the public may have is not the test, when it is acquired from the declarations of the acting, avowed partners; it may enable them to reach the dormant one, if the transaction is one in which he had an interest, but does not alter its nature. The partnership remains dormant as to all whose names do not appear on its transactions. The *dormant, sleeping, inactive* partner may be known by reputation, or the declaration of his copartner; but these do not make him an avowed or active one, without the avowal and pledge of his name or paper." Per Baldwin, J., in Winship *v.* Bank of the United States, 5 Pet. 573. In Mitchell *v.* Dall, 2 Harris & G. 159, however, and Bank of St. Mary's *v.* St. John, 25 Ala. 566, persons seem to have been held dormant partners, who, though their names were concealed, took an active part in the business of the firm. See Lloyd *v.* Archbowle, 2 Taunt. 324; Kelly *v.* Hurlburt, 5 Cowen, 534; Hoare *v.* Dawes, 1 Doug. 371; *Ex parte* Watson, 19 Ves. 461; Shropshire *v.* Shepherd, 3 Ala. 733. The definition and illustration of dormant partnership in Watson on Partnership, p. 46, seems accurate: "Sometimes all the partners in trade do not appear ostensibly to the world, though they share in the profits and loss; and it is not unusual for gentlemen of large and independent fortunes to embark very considerable sums of money in trade, they being oftentimes ignorant of the *science* of commerce, and meaning to depend entirely upon the skill of merchants or traders with whom they engage in a

*34 venient to use the word as indicating *a partner who both keeps himself concealed, and who also refrains from any active interference with the business or management of the firm. But the word is so often used as merely synonymous with "unknown," that we shall frequently be obliged to employ it or refer to it in this sense.

6. *Retiring Partner.*

He is one who leaves an existing firm. In law, as we shall see, the going out of a partner, by his own act, or decree of court, or by death, terminates that partnership. But in practice it is otherwise. Some old firms have continued to use the same style, and to transact their business as one and the same copartnership, with all the continuity of a corporation, although not only all the original members, but all who immediately succeeded them, have passed away. In some of the commercial cities of Europe, there are said to be active firms established under their present names by the great grandfathers of those who are now members. In this country it is, however, more common to announce these changes by a corresponding change in the style of the firm.

7. *Incoming Partner.*

This phrase designates a person who enters into an existing copartnership, and becomes a member of it. Here it may be said, as before, that any such change as the addition of a new member terminates the former copartnership in law and creates a new one. (*pp*) But in practice it is not so; the old firm being "kept up," as the common phrase is, by former members going out from time to time, and new members coming in.

general partnership of all their stock and effects, yet not suffering their names to appear in the copartnership firm, but at the same time receiving a proportionate share of the profits arising out of their joint trade, bearing equally their risk of loss; and such are usually styled dormant partners." See North *v.* Bloss, 30 N. Y. 374; Waite *v.* Dodges, 34 Vt. 181.

(*pp*) Mudd *v.* Bast, 34 Mo. 465. [When two partners enter into another partnership with a third person, they are in the new partnership as individuals, and the profits are to be divided equally amongst the three. Warner *v.* Smith, 9 Jur. N. S. 168.]

8. *General Partner.*

This is a new phrase with us, and is, at least in our sense of it, unknown in the English law. It means one who is that member of a Limited Partnership, under our statutes, who transacts the business, whose name is used in the firm, and who is liable for all the debts and obligations of the firm, to their full amount.

9. *Special Partner.*

* He is one who supplies a certain amount of capital, *35 and who, if he complies with all the requirements of the statutes, is not liable for the debts of the firm beyond the amount which he contributes to the capital.

We have been somewhat precise in defining these different classes or kinds of partners, because it will be seen in our subsequent chapters that especial rights, obligations, liabilities, and remedies belong to them severally.

CHAPTER IV.

OF THE PURPOSES AND KINDS OF PARTNERSHIP.

ALTHOUGH partnerships are usually formed for commercial purposes, they are not always so, and there is scarcely any occupation which an individual can legally pursue that may not be the subject of partnership. In this country we have a far wider extent in the variety of purposes for which partnerships are established, than anywhere else. Thus, we have partnerships not only for every known branch of commercial business, but for all kinds of farming, (*a*) or manufacturing, mining, (*b*) stage-driving, fishing, hunting, lumbering, and the like, as well as the business of lawyers, (*c*) physicians, (*d*) mechanics, artists, laborers, and, indeed, of almost all other employments. (*e*)

(*a*) See opinion of Gould, J., in Coope *v.* Eyre, 1 H. Bl. 37; Allen *v.* Davis, 13 Ark. 28; Lansdale *v.* Brashear, 3 T. B. Mon. 330; Quine *v.* Quine, 9 Smedes & M. 155; Roach *v.* Perry, 16 Ill. 37. [Jointly buying and selling cattle may constitute a trading partnership. Smith *v.* Collins, 115 Miss. 388; and see *post*, p. * 54.]

(*b*) In England, mines have never been regarded in equity as real estate, but uniformly as the regular subject and substratum of a trade. In Williams *v.* Attenborough, Turn. & Russ. 70, the language of the Lord Chancellor is: "Collieries and landed estates are quite different in the contemplation of this court; a colliery being always considered as a trade, the profits accruing from day to day as in all trading concerns." Story *v.* Ld. Winsor, 2 Atk. 630; Wren *v.* Kirton, 8 Ves. 502; Crawshay *v.* Maule, 1 Swanst. 495, 518; Fereday *v.* Wightwick, Tamlyn, 250; Jeffreys *v.* Smith, 1 Jac. & Wal. 298. See Beatty *v.* Bates, 4 Younge & C. Exch. 182; Roberts *v.* Everhardt, 1 Kay, 148. The whole subject of partnership in mines, as treated in the English courts, is considered in a separate chapter in Collyer on Part. b. 5, ch. 2.

(*c*) Marsh *v.* Gold, 2 Pick. 286; Westerlo *v.* Evertson, 1 Wend. 532; Warner *v.* Griswold, 8 id. 665; Livingston *v.* Cox, 6 Barr, 360; Smith *v.* Hill, 13 Ark. 173. See Jones *v.* Caperton, 15 La. Ann. 475.

(*d*) Allen *v.* Blanchard, 9 Cow. 631; Thompson *v.* Howard, 2 Cart. (Ind.) 245.

(*e*) Thus, there may be a partnership in a ferry. Bowyer *v.* Anderson, 2 Leigh, 550. An association for carrying personal property for hire in vessels is a commercial partnership by the laws of Louisiana. Hefferman *v.* Brenham, 1 La. Ann. 146. Ship

* After some question, it seems to be settled, that * 37
there may be a partnership for the buying and selling of land. (*f*) It is to be remembered, however, that the Statute of Frauds, and our Statutes of Conveyance, which require that all interests in land should be transferred by a writing signed and sealed by the grantor, and acknowledged and recorded, thus determine the legal title by different evidence and on different principles from those which apply to personalty. This has sometimes an important effect upon the rights and obligations of partners in land speculations, and of those who deal with them. We have already alluded to this subject, and shall consider it more fully hereafter. (*g*)

It is obvious that there can be no partnership in a mere personal office, or in the discharge of its duties; as in the office of guardian, trustee, executor, or the like. (*h*) These offices

agents and ship brokers may be in partnership as to the profits of their respective commissions. Waugh *v.* Carver, 2 H. Bl. 235. See Bovill *v.* Hammond, 9 D. & R. 186; Cheap *v.* Cramond, 4 B. & A. 663. Private associations and clubs for benevolent and other purposes, have been regarded so far as partnerships, that their members are subject to liabilities similar to those of partners. Beaumont *v.* Meredith, 3 Ves. & B. 180. See Delauney *v.* Strickland, 2 Stark. 416. But their liability seems to rest on the authority given to the agents, rather than on partnership. The points of difference between such associations and trading partnerships are stated and illustrated in Flemyng *v.* Hector, 2 M. & W. 172. See ch. 5, § 1.

(*f*) Lands being now so far subject to commercial conditions, by the aid of equity, as to be capable of being held as incident to commercial partnerships, there would seem to be no sufficient reason why they may not, on the same principles, and by the same equitable conversion, be the substratum itself of a copartnership. The later cases, both in England and in this country, leave little or rather no room for doubt upon this point. Dale *v.* Hamilton, 5 Hare, 369; Potts *v.* Waugh, 4 Mass. 424; Fall River Wh. Co. *v.* Borden, 10 Cush. 458; Smith *v.* Burnham, 3 Sumn. 435; Kramer *v.* Arthurs, 7 Barr, 165; Brady *v.* Calhoun, 1 Penn. 140; Olcott *v.* Wing, 4 McLean, 15; Smith *v.* Jones, 12 Me. 332; Dudley *v.* Littlefield, 21 Me. 418; *In re* Warren, Daveis, 320; Ludlow *v.* Cooper, 4 Ohio St. 1; [Chester *v.* Dickenson, 54 N. Y. 1]. See Patterson *v.* Brewster, 4 Edw. Ch. 352; Claggett *v.* Kilbourne, 1 Black U. S. S. C. 346.

(*g*) See *ante*, ch. 2, § 2, and *post*, ch. 12.

(*h*) Thus, the office of sheriff's bailiff is personal, and cannot be held by two in partnership. Jons *v.* Perchard, 2 Esp. 507. See Canfield *v.* Hard, 6 Conn. 180. Upon the same principle, a mercantile partnership, though it may act as executor, cannot be appointed guardian. De Mazar *v.* Pybus, 4 Ves. 644. Where, by the usage of the herald's office, a herald and pursuivant were always in attendance, who shared the profits of any business which was begun while they were jointly on duty, it was held that they were in the situation of copartners, and might maintain a joint action (for making out a pedigree) against the

*38 are often *held by two or more persons together; but their powers and duties, and relations generally, are governed by rules entirely distinct from those of partnership.

There are additional and decisive reasons against the exercise of the powers or the discharge of the duties of any public office by a partnership. It might seem as if there were some offices, as that of postmasters, or of examiners of steamboats, or the like, which might be given to a firm; but the principle of personal selection and personal responsibility make it difficult, if not impossible, that a firm should hold such an appointment, although persons holding it sometimes become partners, and share in the profits of the appointment. (*i*)

Partnerships may be general or special. In theory, it is said they may be universal; but an instance can seldom occur in which the partners own every thing in common, without the reservation of any private and exclusive property of either of them. (*j*) We have, however, in this country, some associations which might perhaps be regarded as universal partnerships. (*k*) Special partnerships relate only to an ownership or

defendant, though he had contracted only with the herald. Townsend *v.* Neall, 2 Camp. 190. On the other hand, the appointment of one of a firm to the office of sheriff's replevin clerk will not enable the firm to bring a joint action for the expenses of preparing a replevin bond, although it was executed, and the stamp for it provided, in their office. Brandon *v.* Hubbard, 4 J. B. Moore, 367. See Clarke *v.* Richards, 1 Younge & C. Exch. 351. A., an attorney holding numerous lucrative clerkships, stewardships, and other offices, entered into copartnership with B. By the articles of agreement it was stipulated that B. should be a partner with A. in his business, and "that the emoluments arising from the said offices, clerkships, and stewardships as should be held by either of them, the said A. and B., during the partnership, should be considered as partnership property, and be distributable accordingly." *Held*, that the above contract was not void as being an agreement for the sale of an office, either within the 5 & 6 Edw. 6, ch. 16, or within the 49 Geo. 3, ch. 126. Sterry *v.* Clifton, 9 C. B. 110.

(*i*) See Caldwell *v.* Lieber, 7 Paige, 483.

(*j*) United States Bank *v.* Binney, 5 Mason, 183. Story, J., said: "There is probably no such thing as a universal partnership, if by the terms we are to understand that every thing done, bought, or sold is to be deemed on partnership account. Most men own some real or personal estate which they manage exclusively for themselves."

(*k*) A recent case, Goesele *v.* Bimeler, 14 How. 589, would seem to establish, not only that such a partnership may exist, but that, under able administration and conduct, it is not inconsistent with a high degree of individual social prosperity. The defendants in the case were members of a society called Separatists, which emigrated from Germany to the United

use or employment by partners of one thing, or one cargo, or one mercantile *adventure. (*l*) It has been said that if a note or bill of exchange be signed or indorsed by two or more persons jointly, this is a case of special partnership between those persons as to that note or bill. (*m*) The name, however, or the distinction, is of little

*39

States in 1817, and settled in Ohio. In 1819, articles of association were drawn up and signed by the members of the society, consisting of fifty-three males and one hundred and four females. By these articles, the signers surrendered all their individual property, real or personal, present or future, into the hands of three directors, elected annually by themselves. These officers were to conduct the business of the society, to manage all its property, and to account to the society for all their transactions. In 1824, the original articles were amended. An entire union of property, and an absolute renunciation of private ownership, were declared. Provisions were made for the admission of new members. The directors were to conduct the affairs of the society; to apply themselves for its benefit; to provide for the boarding, lodging, and clothing of its members; to provide for the children; to determine disputes, &c. Other of the new provisions related to the general welfare of the society. In 1832, a charter of incorporation was granted them, in accordance with which they adopted a constitution, embodying, with others, substantially the same provisions as those contained in the articles of association above referred to. The extent of the prosperity, which, under this modified species of communism, the association had attained in the space of about thirty years, may be seen in the following extracts from the opinion of Mr. Justice McLean: "It appears, by great industry, economy, good management, and energy, the settlement at Zoar has prospered more than any part of the surrounding county. It surpasses probably all other neighborhoods in the State in the neatness and productiveness of its agriculture, in the mechanic arts, in manufacturing by machinery. The value of the property is now estimated by complainants' counsel to be more than a million of dollars." Further: "The people . . . are proved to be moral and religious. It is said, that, although the society has lived at Zoar for more than thirty years, no criminal prosecution has been instituted against any one of its members." There is no legal objection, it seems, to such an association. See an example of a similar association called "The Harmony Society." Baker *v.* Nachtrieb, 19 How. 126. See Lyman *v.* Lyman, 2 Paine C. C. 11.

(*l*) The authority which is usually referred to for the distinction between general and special partnerships is a *dictum* of Lord Mansfield in Willett *v.* Chambers, Cowp. 814. "Let us see, then," said he, "what was the nature of the partnership afterwards entered into between Dodley and the present defendant: whether it was a general partnership in all Dodley's business, or confined to one particular branch of it only; for, to be sure, there may be such a confined partnership." Very many cases have since recognized and illustrated the distinction. Salmons *v.* Nissens, 2 T. R. 674; Robey *v.* Howard, 2 Stark. 557; Holmes *v.* Higgins, 1 B. & C. 74; De Berkom *v.* Smith, 1 Esp. 29; Livingston *v.* Roosevelt, 4 Johns. 265, 270; Post *v.* Kimberly, 9 id. 470; Mumford *v.* Nicoll, 20 id. 611; Ensign *v.* Wands, 1 Johns. Cas. 171; Reynolds *v.* Cleveland, 4 Cow. 282; Cumpston *v.* McNair, 1 Wend. 457; Mifflin *v.* Smith, 17 S. & R. 165; Bentley *v.* White, 3 B. Mon. 263; Benson *v.* McBee, 2 McMull 91; Solomon *v.* Solomon, 2 Kelly, 18; Ripley *v.* Colby, 3 Fost. 438; Petripin *v.* Collier, 1 Barr, 247.

(*m*) Gow on Part. 6; 3 Kent (8th

*40 *use, for all the laws of partnership apply as far, and only as far, as the partnership extends; and there is no distinct dividing line between general partnerships and those which have been called special. And the designation, by statute, of the partner in a limited partnership, who is liable only to the extent of the capital he supplies, as "special partner," is an additional reason for the disuse of the phrase "special partnership," in the sense above stated.

Joint-stock companies will be treated by themselves. They are much used in England, and are there regulated by statute. Here they were quite common formerly. But incorporation may here be obtained with great facility for any legitimate purpose; and wise and practical laws, in many of our States, give to corporations all the freedom and all the facilities they can desire, and limit the responsibility of members as narrowly as a due regard for public safety, and, indeed, the safety of the members, permits; and joint-stock companies are now comparatively rare.

Limited partnerships, to which we have already alluded, we shall speak of more fully in a subsequent chapter. (*n*)

ed.), p. 28. The only authority for considering such joint promise or indorsement as constituting a partnership is the case of Carvick *v.* Vickery, 3 Doug. 653, note. There the action was by the indorsee of a bill of exchange drawn upon defendants, the Maydwells, by father and son, and payable "*to us or our order*," but indorsed only by the son. The father and son were admitted not to be partners. At the first trial Ld. Mansfield nonsuited the plaintiff, because the bill had not been indorsed by both the parties to whose order it was payable. But a rule being obtained to show why there should not be a new trial, the court were unanimously of opinion that the Maydwells, by making the bill payable "*to our order*," had made themselves partners as to this transaction, and the rule was made absolute. Upon the second trial, before Ld. Mansfield, a verdict was again found for the defendants on the same ground, that the indorsement should have been made by both parties to whom the bill was payable. This verdict does not appear to have been disturbed. So that, the result of the case being considered, it can hardly be said to be authority for the position that joint promisors or joint indorsers of a bill or note are *quoad hoc* partners; since the second verdict could only have been upheld on the ground that the defendants were not partners. The case does not seem to rest on sound principles, and is unsupported by any other English authorities. In this country, it has been distinctly repudiated. In Willis *v.* Guen, 5 Hill, 232, Nelson, C. J., says: "It was once supposed, in a like case, that the indorsers were partners *quoad* the particular transaction; but that doctrine was repudiated when the case afterwards came on for trial before Lord Mansfield." Sayre *v.* Herick, 7 Watts & S. 383; Hopkins *v.* Smith, 11 Johns. 161; Shepard *v.* Hawley, 1 Conn. 367. See Mifflin *v.* Smith, 17 S. & R. 165.

(*n*) See *post*, ch. 17.

CHAPTER V.

WHO ARE PARTNERS AS TO EACH OTHER.

The power of partners over each other, and the responsibility of partners for each other, and their mutual rights and obligations, often make it extremely important to determine who stand in this relation to each other.

The basis of this relation is community of interest. But the question has often arisen, and been much discussed, how far this community must extend; whether, for example, it must cover all losses as well as all profits. And although it is undoubtedly true, that in much the greater number of partnerships there is a community of loss as well as of profit, the weight of authority as well as of reason seems to be decidedly in favor of the rule that there may be a legal and valid partnership, although one or more of the partners are guaranteed by the others against loss. (*a*) And even if one of the parties

(*a*) The doctrine, that persons cannot be partners as to each other unless they participate in the losses of a trade, is founded on the language of the judges in several of the leading cases upon partnership. It is also asserted in many other cases which have followed them, and in some is made the apparent ground of decision. Thus in Grace *v.* Smith, 2 W. Bl. 998, De Grey, C. J., says: "Every man who has a share of the profits of a trade ought also to bear his share in the loss." And in Hoare *v.* Dawes, 1 Doug. 371, and Coope *v.* Eyre, 1 H. Bl. 37, the criterion of partnership laid down by all the judges is a participation in "profit and *loss*." In Waugh *v.* Carver, 2 H. Bl. 235, Lord Chief Justice Eyre gives as his reason for holding that the parties were clearly not actual partners, that they were not to be liable in common for losses. Day *v.* Boswell, 1 Camp. 329. So in Green *v.* Beesley, 2 Bing. N. C. 108, the court lay great stress upon the fact that the parties sought to be charged as partners were to participate in losses as well as in profits; Tindal, C. J., saying, "I have always understood the definition of partnership to be a mutual participation in profit and loss." In Bond *v.* Pittard, 3 M. & W. 357, A. & B., attorneys and solicitors, carried on business together under an agreement by which B. was to have out of the profits 300*l.* annually, but was not to be liable for any losses, and was to have a lien on the profits for any losses he might sustain by reason of his liability as partner to third persons. A. & B. joined in an action of debt against the defendant, for work and labor done as his attorneys, and

agrees to be liable for losses, although he is not to participate in the profits, it is possible that there may be a partnership here. (*aa*)

the question was, whether the joint action could be maintained. The judge, at the assizes, told the jury that to constitute a partnership there ought to be a community of loss as well as profit; that a third party was not concluded by having dealt with them as partners, if it turned out that they were not at the time partners in law, for want of a community of profit and loss, and might therefore object to their having been joined as plaintiffs in the action. And he left two questions to the jury: first, Was there a community of profit? and, secondly, Was there a community of loss? The jury found the first question in the affirmative, and the second in the negative, and, under the direction of the judge, the verdict was entered for the defendant. A rule being obtained, the precise question, whether there must be a sharing of loss as well as of profit, to constitute a partnership *inter se*, was not considered by the court. Lord Abinger, C. B., however, in his opinion, intimates that B. was in some degree a sharer in the losses. The case, however, was disposed of on other grounds. See Pott *v.* Eyton, 3 C. B. 32.

To the same effect as these English cases, are apparently many American authorities. See the language of the courts in Felichy *v.* Hamilton, 1 Wash. C. C. 491; Putnam *v.* Wise, 1 Hill, 239; Burckle *v.* Eckhart, 1 Denio, 341, 342; Ambler *v.* Bradley, 6 Vt. 119; Bowman *v.* Bailey, 10 id. 170; Bucknam *v.* Barnum, 15 Conn. 72; Churchman *v.* Smith, 6 Whart. 148, 149; Lowry *v.* Brooks, 2 McCord, 422; Simpson *v.* Feltz, 1 McCord Ch. 218, 219; Beecham *v.* Dodd, 3 Harr. 485; Pollard *v.* Stanton, 7 Ala. 761; Emanuel *v.* Droughn, 14 Ala. 306; Buckner *v.* Lee, 8 Ga. 288; Wood *v.* Vallette, 7 Ohio St. 172. But of these cases it is to be observed, first, that the remarks of judges, to the effect that partners *inter se* must participate in losses as well as profits, are frequently general ones, not strictly applicable to the facts before them; and, secondly, that the real meaning of such observations is often nothing more than that a party's exemption from the losses of a trade is a fact, which, though not conclusive, tends to show that he is not an actual partner, and, taken in conjunction with other circumstances, may clearly establish that fact. In Vanderburgh *v.* Hall, 20 Wend. 71, the court, deeming one of the parties before them to be merely an agent, paid out of profits, and not a partner, add: "He was not to be answerable for losses, which *confirms the view* that the arrangement was made simply in reference to the measure of compensation." The true principle seems to be laid down by Lord Eldon in *Ex parte* Langdale, 18 Ves. 301: "A man, who is to have no profit, may be a partner, if holding himself out as such; as by lending his name. He may also be a partner when the contract is that he shall suffer no loss; and, I agree, it is not the less a partnership because part of the contract is, that they are not to suffer by bad debts, the personal negligence of him who has the custody of the articles, by fire, &c." See Brigham *v.* Dana, 29 Vt. 1. So in Gilpin *v.* Enderby, 5 B. & Ald. 954, where, though one of the parties was guaranteed against all debts and losses, there being no usury in the case, the court held that there was a partnership, though of a peculiar kind; and the circumstance that one of the parties was not to bear any losses was not adverted to. See Fereday *v.* Hordern, Jacob, 144. The distinction between participation in gross and in net proceeds arises more frequently with respect to partnership as to third persons.

(*aa*) For such a case, see Mandeville *v.* Mandeville, 35 Ga. 243.

It would * seem that there must be a community of * 42
interest for business purposes. (*b*) It cannot be said
that partnership exists only for * buying and selling; * 43
for, as we have seen, physicians and lawyers, who
neither buy nor sell professionally, may yet form a professional

(*b*) Hence, voluntary associations or clubs, for social and charitable purposes, and the like, are not proper partnerships; nor have their members the powers and responsibilities of partners. In Flemyng *v.* Hector, 2 M. & W. 172, the defendant, a member of the "Westminster Reform Club," was sought to be charged as partner for goods supplied and work done for the club at the order of its committee. Lord Abinger, C. B.: "I had thought, but without much consideration, at the Assizes, that these sort of institutions were of such a nature as to come under the same view as a partnership, and that the same incidents might be extended to them; that where there was a body of gentlemen forming a club, and meeting together for one common object, what one did in respect of the society bound the others, if he had been requested and had consented to act for them. . . . Trading associations stand on a very different footing. Where persons engage in a community of profit and loss as partners, one partner has the right of property for the whole: so any of the partners has a right in any ordinary transaction, unless the contrary be clearly shown, to bind the partnership by a credit; — he might accept a bill of exchange in the name of the firm, and as between the firm and strangers the partnership would be bound, although there might be an understanding in the firm that he was not to accept. It appears to me that this case must stand upon the ground on which the defendant put it, as a case between principal and agent; . . ." Gurney, B.: "The discussion which has taken place in this case has convinced me that this is not the case of a partnership, but of principal and agent; . . ." So, "clubs" are neither "partnerships" nor "associations" within the meaning of the Winding-up Acts. *In re* The St. James Club, 2 De G., M. & G. 383, 13 Eng. L. & Eq. 589. See *ante*, p. * 36, note (*e*). Nor is a company, the purpose of which is the purchase of lands with funds raised by subscription, and the division of such lands amongst the subscribers, a company entitled to registration under 7 & 8 Vict. ch. 110, which (§ 2) applies only to associations formed "for any commercial or trading purposes." Queen *v.* Whitmarsh, 15 Q. B. 600. See Delanney *v.* Strickland, 2 Stark. 416; Caldicott *v.* Griffiths, 8 Exch. 898, 22 Eng. L. & Eq. 527; Cockerell *v.* Aucompte, 2 C. B. N. S. 440; Bright *v.* Hulton, 3 H. L. Cas. 341, 12 Eng. L. & Eq. 1. *In re* Worcester Corn Exchange Company, 3 DeG., M. & G. 180, 19 Eng. L. & Eq. 627; Cheney *v.* Clark, 3 Vt. 431. Persons who subscribe in writing certain sums, for the purpose of building a meeting-house, which, when completed, is to be the property of the subscribers in the proportion of their subscriptions, are not partners. Woodward *v.* Cowing, 41 Me. 1. And the members of a telegraph company are not partners, but only tenants in common. Irvine *v.* Forbes, 11 Barb. 587. Nor are the subscribers and holders of stock in a manufacturing corporation which has been defectively organized, and transacted business under such defective organization, thereby made partners, general or special, in such business. Fay *v.* Noble, 7 Cush. 188. [Nor if they obtain a certificate of incorporation are they liable as partners, by reason of having transacted business before the capital stock was paid in, contrary to the statute. First Nat. Bk., &c. *v.* Almy, 117 Mass. 476. But see *post*, p.* 542, note; Whipple *v.* Parker, 29 Mich. 370, *contra*.]

partnership, which is entirely legal and to which all the rules and privileges of the law of partnership apply.

Usually, the purpose of the partnership is to buy goods and sell them again. It seems, however, that if the intention of acting in common is limited to buying and making, or if a valuable product arises from a contribution to common stock of one thing by one and another thing by another, and a working on and with those things by both, this may constitute a partnership as to the ownership of that product, and in all the transactions which led to it, although the product itself was
* 44 not to be sold on common * account, but divided between the parties to it. This would be a manufacturing partnership; and the fact that the parties engage in common labors for the purpose of producing a new product out of a common stock, which is to belong to them when made, is, according to some authorities, enough to make it a partnership. (*c*) This is

(*c*) Musier *v.* Trumpour, 5 Wend. 274. The plaintiff was the owner of a lime-kiln, and agreed with the defendant that the latter should fill the kiln with stone, furnish the necessary wood, and burn the kiln, the lime to be equally divided between them. *Held*, that a technical partnership existed as to the lime. In Everitt *v.* Chapman, 6 Conn. 347, A., B., and C. carried on jointly the business of tanning hides, under an agreement by which A. furnished hides for one-half of the stock, and received and made market for one-half of the leather; and B. and C. furnished the other half of the stock, and received and made market for the other half of the leather. One of the questions in the case being whether a partnership existed between the parties, it was objected that the leather when manufactured was to be divided between the copartners, that is, that B. and C. were to receive and sell one-half, A. the other. Daggett, J.: "Be it so. The leather was to be divided into moieties in quantity and quality. Such is the clear meaning of the article. Is it not the same, then, as if the whole leather was, by agreement, to be sold by either of the partners, or by an agent, and the avails divided?" Upon this case it is remarked, however, by the court, in Loomis *v.* Marshall, 12 Conn. 86, that "it is not entirely clear that when the leather was manufactured, it was to be equally divided, and a moiety to be taken by each, as his separate property. It would seem rather to have been the intention of the parties, that both should bear equally the burden of disposing of the leather in market for the equal benefit of both, subject to accountability." See 15 Conn. 73. In Stoallings *v.* Baker, 15 Mo. 481, the plaintiff and defendant had entered into an agreement for getting out lumber, by the terms of which one of the parties was to furnish a saw-mill and workmen, the other the logs to be sawed; and the lumber to be equally divided between them. *Held*, that those facts did not constitute a partnership *inter se*, since it appeared that the lumber was to be sold, not on joint account, but by each party separately on his own. So also in Blue *v.* Leathers, 15 Ill. 31, where the object of the joint enterprise was the tillage of land, and the crops were to be equally divided by the parties. See, however, *contra*, Allen *v.* Davis, 13 Ark. 28. And see Meaher *v.* Cox, 1 Select Cas. Ala. 156; Martin

open to some question, it is true; that the thing thus made, after being divided among them, is to be sold by each. This

v. Tidwell, 36 Geo. 332. [An agreement between two persons that one shall furnish land and stock, and the other the labor, each to pay one-half the cost of feeding the stock and laborers, and other plantation expenses, and divide the crop equally, is a partnership as between the parties. Hollifield *v.* White, 52 Ga. 567. Otherwise, if there be no community of expense. Holloway *v.* Brinkley, 42 Ga. 226; Smith *v.* Sumner, 48 Ga. 425. So where the owner of a tug and the owner of a barge went into the freighting business, with their respective vessels, wages and expenses (except for repairs) to be paid out of the earnings, and the balance of the profits to be divided in proportion to the agreed values of the respective vessels, this was held to be a partnership. Bowas *v.* Pioneer Tow Line, 2 Sawyer, 21. But see Fay *v.* Davidson, 13 Minn. 523. So an agreement that A. shall furnish a stock of goods, shop fixtures, &c., and that B. shall pay the rent of the shop, manage the business, and pay A. interest on one-half of the fixtures, the profits to be divided equally, renders A. and B. partners as to third parties, although it be orally understood, at the time of executing the agreement, that the share of profits to B. shall be in lieu of salary. Brigham *v.* Clark, 100 Mass. 430. So where three partners agree "to enter upon an operation embracing the purchasing and selling of shingles," — one to purchase, and the other two to receive and sell, the shingles, to be the property of these two, who were to furnish the capital, — all to share equally the profits and losses, they are partners as to third parties. Getchell *v.* Foster, 106 Mass. 42. An agreement by which one party contributes his inchoate interest in an invention, and another contributes the money necessary to procure a patent, and both are to render their services in making it remunerative, is an agreement for a partnership. Somerby *v.* Buntin, 118 Mass. 279. Where one contributes the use of real estate, and the other furnishes capital and labor, whereby the former is utilized, the profits to be divided, a partnership is constituted. Wood *v.* Beath, 23 Wis. 254; Dalton *v.* Dalton, 33 Ga. 343. A. and B. opened a joint account with a bank; B. guaranteeing payment of any business which might be done from A. & B., as "A. & Co." A. carried on the business as "A. & Co.," in which B. took no part. *Held* partners. *Ex parte* Good, 5 Ch. D. 46; reversing *Ex parte* Halifax, &c., 25 W. R. 83. As to what particular facts constitute a partnership in special cases, see further Duff *v.* McGuire, 99 Mass. 300; Decker *v.* Howell, 42 Cal. 636; mining enterprises, Pettee *v.* Appleton, 114 Mass. 114; Adams *v.* Carter, 53 Ga. 160; brickmaking, Farmer's Ins. Co. *v.* Ross, 29 Ohio St. 429; farming, Beauregard *v.* Case, 91 U. S. 134; leasing a railroad, Wills *v.* Simmonds, 51 How. (N. Y.) 48; agreement amongst creditors to continue and carry on the business of a debtor, Pettes *v.* Atkins, 60 Ill. 454; agreement between tinner and plumber to work together, Tyler *v.* Scott, 45 Vt. 261; jobbing, Gillbank *v.* Stephenson, 31 Wis. 592; agreement to purchase and man a ferry-boat, Whitman *v.* Porter, 107 Mass. 522; joint-stock association, unincorporated, for purchase of land and boring for oil, Hedge's Appeal, 63 Penn. St. 273; agreement between two railroad corporations, Gill *v.* M. & L. R. R., L. R. Q. B. 186; lumbering enterprise, Upham *v.* Hewett, 42 Wis. 85; McComb *v.* Credit Mobilier, 34 Leg. Int., 29 U. S. C. Ct. Dist. Penn.; building a railroad; lease of mill, half profits as rent, Dalton & Co. *v.* Hawes, 37 Ga. 115; (but see Parker *v.* Fergus, 43 Ill. 437;) where one advances capital, and the other supplies services, the profits being shared, Wright *v.* Davidson, 13 Minn. 449; Parker *v.* Canfield, 37 Conn. 250; series of adventures, El-

may constitute it a business transaction; but if the parties thus combined stock and work for a product to be divided between them, and not for sale, but for each party to keep and use the share that fell to him, we should say it was certainly not a partnership.

It is not perhaps certain, whether the law of partnership requires a community of interest in the profits resulting from the business or work done. We think, however, that
*45 this is requisite. (*d*) * Thus, if persons purchase goods

dredge *v.* Frost, 1 Rob. (N. Y.) 518. As to special facts which do not constitute a partnership, see further Morrison *v.* Cole, 30 Mich. 102, contract of one to deliver to the other hay, which the latter is to take to market and sell; Beckwith *v.* Talbot, 2 Col. T. 639, contract to keep and sell cattle; Anten *v.* Ellingwood, 51 How. (N. Y.) 359, editing and conducting a newspaper; Marsh *v.* N. W. Ins. Co., 3 Biss. U. S. C. Ct. 351; Lewis *v.* Greider, 51 N. Y. 231, single mercantile adventure, — series of adventures; but see Smith *v.* Wright, 4 Abb. (N. Y.) App. Dec. 274; common interests in a patent-right, Bocklen *v.* Hardenburgh, 37 N. Y. Supr. Ct. 110; cultivation of land on shares, Holloway *v.* Brinkley, 42 Ga. 226; cheese-factory association, Hawley *v.* Keeler, 62 Barb. (N. Y.) 231; purchase of land and erecting buildings thereon, Kelshaw *v.* Jukes, 8 L. T. N. S. 387; joint contract to perform labor and furnish materials, each a specific part, Smith *v.* Moynahan, 44 Cal. 53; advance of money for prosecution of business to be reimbursed out of sales, with share of profits in lieu of interest, Lintner *v.* Millikin, 47 Ill. 178. See also Edwards *v.* Tracy, 62 Penn. St. 374; Dailey *v.* Hall, 5 Bush (Ky.), 549; Freese *v.* Ideson, 49 Ill. 191; Parker *v.* Canfield, 37 Conn. 317. A debt of A. is transferred to and assumed by B., who is to pay it out of the profits of a partnership. This does not make A. a member of the firm. Delaney *v.* Timberlake, Sup. Ct. Minn., 15 Abb. L. J. 513. If A. agrees to advance B. a certain sum, to enable the latter to carry on business, who is to pay interest on the average balance, A. receiving his share of the profits after expenses are paid, but not to be liable for losses, is not a partnership as to third persons. Smith *v.* Knight, 71 Ill. 148.]

(*d*) Such certainly would seem to be the principle of many adjudications, which, coupled with the numerous opinions of judges to the same effect, are apparently decisive of the point. Thus, in Hoare *v.* Dawes, 1 Doug. 371, several persons had employed a broker to purchase a lot of tea, of which they were to have a separate share. The question being whether the employers of the broker were partners, so as to make any one of them liable for the price of all the tea so purchased, it was *held*, that they were not; since there was no communion of profit and loss, but merely an undertaking with the broker, by each, for a particular quantity. So in Coope *v.* Eyre, 1 H. Bl. 37, where Lord Loughborough says: "If the parties be jointly concerned in the purchase, they must also be jointly concerned in the future sale; otherwise, they are not partners." On the same principle, joint purchases of land, or even of merchandise, by two or more, cannot have the effect of making them partners, nor of raising a presumption that they are so. Porter *v.* M'Clure, 15 Wend. 187; Ballou *v.* Spencer, 4 Cow. 163; Brady *v.* Calhoun, 1 Penn. 140; Gilmore *v.* Black, 2 Fairf. 485; Putnam *v.* Wise, 1 Hill, 234; Barton *v.* Williams, 5 B. & Ald. 395; Noyes *v.* Cushman, 25 Vt. 390. In this last case, C. and N. bought a grist-mill and privilege, and agreed to share the ex-

to be sent on a mercantile adventure, the proceeds to be reinvested in a return cargo, the question may arise, When and how long are they partners? Here it would seem that, if there be a partnership in the buying of the goods, and in the sending of them abroad and there selling them, there may still be no partnership in the purchase or the ownership of the return cargo, unless that cargo was to be sold for the common benefit. For if it is to be divided *in specie*, each of the company taking in severalty his share, it may be doubted whether it could be said that there was any partnership in the return cargo. (*e*)

pense of refitting and repairing the same. They afterward sold one-sixth of the mill and privilege to M., who agreed to bear the cost of repairing and refitting in like proportion. *Held*, that by these mutual contracts to repair and rebuild, C., N., and M. were not made partners; but that, when they thus purchased and contracted, with a view to a joint enterprise and under an agreement to share in the profit and loss thereof, a partnership was then constituted between them.

(*e*) See preceding note. Holmes *v.* United Insurance Company, 2 Johns. Cas. 329. The plaintiff effected a policy of insurance upon a return cargo for $25,000, from Calcutta to Baltimore, "interest as it may appear." His actual interest in the cargo, which was owned by himself and four other persons, proved to be about $13,000. He claimed to recover in the present action the overplus premium, and was clearly entitled so to do, unless the other co-owners of the cargo were partners with him, and might therefore, in case of loss, have covered some part of their interest under his policy. The only facts tending to establish a partnership were that the cargo belonged to the plaintiff and the four other persons, and had been purchased with the proceeds of an outward cargo, which belonged to the same persons. The plaintiff was not connected in trade with the other co-owners of the cargo, and effected the insurance for himself alone, without their direction or concern. The court *held*, that the plaintiff was not a partner, since there was no agreement to share in the profit and loss resulting from the sale of the return cargo. The same question arose and was similarly decided in Post *v.* Kimberly, 9 Johns. 470. There, A. & M., owners of three-fourths of a ship, purchased three-fourths of a cargo for a joint adventure from New York to Laguira. B. & K., owners of the other fourth, separately purchased and shipped the other fourth of the cargo. The two shipments were not distinguished from each other by any particular marks, and were to be sold at Laguira by M., who went out as supercargo, for the joint account and benefit of A. & M. and B. & K., according to their respective shares in the cargo. M. sold the cargo at Laguira, and invested the proceeds in a return cargo. The ship being driven by stress of weather into Norfolk, M. there sold the greater part of the return cargo, and remitted and indorsed bills of exchange therefor to P. & R., to whom A. & M. were jointly indebted, and A. on his private account, for advances made at the time of the purchase of the outward cargo. The portion of the cargo not sold at Norfolk was also forwarded to P. & R., who applied it, together with the bills of exchange, to the payment of the debts due to them from A. & M. Before this was done, however, notice was given to P. & R. of the interest of B. & K. in the cargo thus disposed of by M. Upon this state of facts it was *held*, by a majority of the court, 1st, that, if any partnership at all existed between A. & M.

And where one party let another have all the timber on his land, and the other was to saw it, and pay to the first one-fifth of the gross proceeds, this constituted them partners as between themselves. (*ee*)

* 46 * Physicians or lawyers are partners, if the earnings of all come into a common stock or fund, and not until then are divided and held in severalty. (*f*) They may * 47 call themselves partners; but if * each charges in his own favor what he earns, and each has a right to

and B. & K., it was in the outward cargo, so far as respected its transportation and sale, for joint profit and loss, and began with the lading on board of the goods; 2d, but that there was no partnership between A. & M. and B. & K. in the return cargo, since there was no agreement for its sale on joint account, and for sharing in the profit and loss thereof; and hence, that the acts of M. were not binding upon B. & K., as being partners; that they were entitled to recover their proportion of P. & R., who had not received the bills in the course of trade, and had taken them with a knowledge of the interest of B. & K. So where an abandonment of a ship was made, and separately accepted by underwriters who had separately insured, they were held not to be made partners thereby, so as each to be liable for the whole amount of the expenses incurred in repairing and refitting the vessel. And this, on the ground on which the above cases were decided, that there was no *community* of interest in the results of the joint undertaking. United Insurance Company *v.* Scott, 1 Johns. 106. See Thorndike *v.* De Wolf, 6 Pick. 120. The same principle is frequently illustrated in cases where goods, purchased either with joint or separate funds, are sent on a common adventure, but are to be sold by the consignee or agent on separate account. Harding *v.* Foxcroft, 6 Greenl. 76; Jackson *v.* Robinson, 3 Mason, 138; Hall *v.* Leigh, 8 Cranch, 50. See also Felichy *v.* Hamilton, 1 Wash. C. C. 491; Osborne *v.* Brennan, 2 Nott & McC. 427; Gibson *v.* Lupton, 9 Bing. 297; Sims *v.* Willing, 8 S. & R. 103.

(*ee*) Fail *v.* McRee, 36 Ala. 61. See also Whitney *v.* Ludington, 17 Wis. 140; and Schoeffling *v.* Schwarting, id. 320.

(*f*) Bond *v.* Pittard, 3 M. & W. 357. The principal question in this case was whether A. and B., attorneys and solicitors, admitted to be partners as to third persons, were partners *inter se*, so that their assignees might join in maintaining the present action. The agreement under which they entered into business together was that B. should, in each and every year, be entitled to receive, in the first place, out of such profits the sum of 300*l.*; but he was not to bear any of the losses of the said business, and was to have a lien on the profits for any losses he might incur as partner; though, in case of failure of profits, he was to sustain not only the loss of his stipulated share therein, but also losses in respect of his liability as a partner to third persons. Parke, B.: "According to the agreement between them, it appears that P. H. Watts was to receive 300*l.* a year *out of the profits*, that is, out of the *net profits*, which could not be ascertained until a view was taken of the real state of the accounts at the end of the year. But, in the mean time, doubtless the money recovered in this action would be the joint property of both, and would go into the general fund for the benefit of both, until that state of things should arise when a division would take place; and for this reason I am of opinion that in this case the contract is with both." In Darracott *v.* Penington, 34 Ga., the court consider the nature and objects of a law partnership. See Atkinson *v.* Mackreth, Law Rep. 2 Eq. Cas. 570.

demand and sue for this in severalty, they are not partners *inter se*, however liable they might be to others from calling themselves so. (*g*)

So if three or four persons agree to buy jointly all of a certain commodity in the market, and agree that one only shall buy for all, and that what he buys shall be divided between them, they are not partners, for the want of a community in the disposition of the merchandise. (*h*)

There may be a partnership both in the property and in the profits, although it is all bought by the funds of one, and even if it be a single business transaction. Thus, if a merchant directs a broker to buy, store, and sell a certain quantity of specified merchandise, the broker not to charge his usual commission, or any commission whatever, but instead of this to be interested in the business in a certain proportion, here it might be thought that the broker has no interest in the property so bought; but, when it is sold, the original cost and charges are to be repaid to the merchant, and the balance, being profits, is to be owned by the two as partners, in the agreed proportions. It seems, however, to be held, and for reasons not without their force, that the broker is interested as a partner in the property itself; that it is a partnership, limited to a single transaction, in which he contributes skill and care, and the other partner money; and that the broker has all the rights and powers of a partner in respect to the merchandise as soon as it is bought, at least as to third parties. (*i*)

(*g*) Finckle *v.* Stacy, Sel. Ca. Ch. 9, where joint articles were entered into by two persons for the doing a particular piece of work, on account of which several sums of money were jointly received by them, and immediately divided between them; though the court was of opinion that it was not to be considered a partnership, but only an agreement to do a particular act, between which there was great difference; and that it was so was plain, for the money which they received they immediately divided, and did not lay out on a common account. See also Porter *v.* M'Clure, 15 Wend. 187.

(*h*) Coope *v.* Eyre, 1 H. Bl. 37. See Ward *v.* Gaunt, 6 Duer, 257. See notes (*d*) and (*e*), *ante*.

(*i*) Reid *v.* Hollinshead, 4 B. & C. 867. The case of Bradbury *v.* Smith, 21 Me. 117, *seems* to have been decided upon the same ground. There, B. & C. had intended and attempted to form a limited statutory partnership; C. contributing all the capital, and receiving a certain percentage of the profits, B. performing all the labor, and receiving the remainder of the profits. There was some doubt whether the provisions of the statute had been complied with, and whether the partnership was not therefore a general one. But the court *held*, that, whether

* 48 * There seems no sufficient objection to the doctrine held in some cases, that there may be a partnership in the profits, where there is none in the property. (*j*) Thus, in

the partnership was general or special, under the statute of Maine, the goods bought with the capital furnished by C. were partnership property, and therefore liable to attachment for the separate debt of B. See Doane *v.* Adams, 15 La. Ann. 350.

(*j*) In such cases, though the property itself is not owned by the partnership, yet the use of it forms part of the capital stock, and is the contribution of that partner to whom the property belongs. In Meyer *v.* Sharpe, 5 Fount. 74, G., a merchant in London, consigned a cargo to his agents, K. & L., in Russia, with the proceeds of which they, according to his directions, purchased and fitted out a return cargo. K. & L. were interested in one-third of the profit and loss of the outward adventure, and in one-half of the profit and loss of the homeward adventure. The bills of lading for the return cargo were forwarded to G., who thereupon pledged them to S. as security for advances. G. became bankrupt. The return cargo being prevented from leaving Russia, K. & L. afterwards, and without the knowledge of G. or S., took out and sold part of the return cargo, which, however, at the instance of G., they afterwards replaced. The substituted goods were, at G.'s request, assigned by K. & L. to S., and the bills of lading therefor forwarded to him by G. The main question presented was, Who were entitled to the substituted goods, S. to whom they had been assigned, and who held the bills of lading, or the assignees of G ? The court *held* that they belonged to G.'s assignees: for that K. & L. could not make a valid assignment of the goods, unless they were partners therein with G.; but that there was a clear distinction between the being partners in the goods, and being interested in the adventure; and that, in this case, the intention of the parties was not that K. & L. should have any interest in the goods themselves, but that they should be interested in the profits of the concern only. See *Ex parte* Hodgkinson, 19 Ves. 291; Dry *v.* Boswell, 1 Camp. 329; Wish *v.* Small, id. 331, note; Patterson, J., in Burnell *v.* Hunt, 5 Jur. 650; Mair *v.* Glennie, 4 M. & S. 240; Ward *v.* Thompson, 1 Newb. Adm. 95; Bryant *v.* Wardell, 2 Exch. 479; Brigham *v.* Dana, 3 Williams, 1. In Chase *v.* Barrett, 4 Paige, 148, however, the doctrine is distinctly asserted by Walworth, Chancellor, that, to "constitute a partnership as between the parties themselves, there must be a joint ownership of the partnership funds, according to the intention of the parties." The facts of that case, and the ground upon which it was decided, are exhibited in the following extract from the opinion of the court: "What, then, was the nature of the agreement into which the parties entered in this case, according to the manifest intention, as apparent from the agreement, when taken in connection with the situation and relationship of the several parties thereto ? The father, a man of considerable wealth, consisting principally of real estate, agrees with his three sons and his son-in-law, who appear to have had but little property of their own, that they shall work such farms as he then owns, or as he may afterwards purchase, for the term of five years, and shall put in all their property for his benefit, except their household furniture; that he would put on to the farms all the teams, tools, and implements of husbandry he then owned; that his younger sons should also work on the farms; that, at the expiration of the five years, the three sons and the son-in-law, who were parties to the agreement, should have the one-half of the chattels which the father owned at the time of making the agreement, and one-half of the property produced by carrying on the farms, deducting the expenses, and also

a case similar to that just * stated, if it could be shown * 49
that the broker was always spoken of as such, and called
and treated as an agent, it would seem that he has no interest
in, no control over, and no right to demand or receive,
any thing more than his share in the profits. (*k*) * And * 50

one-half of the real estate he then owned, or which he should own, at the expiration of the agreement. In the mean time, the several parties were to have their living and expenses out of the product of the farms; and the teams and other implements of husbandry, which might be wanting during the five years, were to be paid for out of the produce of the farms. I think it is evident, from the provisions of this agreement, that it was the intention of the father to keep the legal title to the whole real and personal property in his own hands during the five years; and that the performance of the services by the sons and son-in-law was a condition precedent to the conveyance to them of a share of the property." And, apparently, upon this ground, that the property employed in the joint enterprise belonged to one of the associates alone, and not to them all jointly, the court *held*, that the father was not a partner with his three sons and his son-in-law. The same position would seem to be taken in Dwinel *v.* Stone, 30 Me. 384. There, the defendant denied that he could be summoned as trustee of S. on the ground that S. was a partner with him in the particular business, that of getting out lumber, out of which his indebtedness arose. The defendant in his answers stated that he paid for and furnished a permit to cut and haul logs; that S. made no advance, except his labor; that the business of the concern was transacted in his, the defendant's name, without any understanding as to whose name the concern should be in; that himself, S., and a third person agreed to take said permit, and go on with the operation as partners, sharing profit and loss; that S. had no interest except as partner. The court, after premising that the declarations of the parties would not suffice to make them partners, said: ' Those answers clearly show that the defendant alone paid for the permit; . . . that the title to it, and to the lumber cut under it, were in him. There could, therefore, be no community of interest between the defendant, Sawtelle & Spaulding, in the capital upon which the labor was performed and the business transacted. The labor was performed upon the lumber, and its price or value became immediately incorporated with it. There were no funds, no effects, no means, for profit and loss separate from the lumber or capital. There could, therefore, be no profit and loss or interest separate from the capital, in which there was a community of interest, and which could constitute a partnership proper. No one but the defendant could have disposed of any thing pertaining to the business." And the court *held*, that the transaction was similar in principle to cases in which persons receive a share in profits by way of wages; and that, therefore, there was no partnership. *Quære*, Whether in this case the lumber was to be sold on joint account, or to be divided between the parties? See Lowry *v.* Brooks, 2 McCord, 421; Ogden *v.* Astor, 4 Sandf. 322; Beecham *v.* Dodd, 3 Harrison, 485.

(*k*) Hence the creditors of one who is partner only in the profits cannot take in execution the property which is contributed as capital wholly by the other partner. Thus, in *Ex parte* Hamper, 17 Ves. 404, Lord Eldon says: "Suppose two persons concerned in a cargo in this manner, the whole being the property of one, but a profit out of the proceeds to go to the other; it would be extremely difficult to maintain that the creditors of the latter could take in execution a moiety of

if more be paid him by a debtor of the merchant, that debtor must pay it over to the merchant or his representatives. (*l*) Such cases cannot always be reconciled. But the apparent conflict comes perhaps from the fact that the person acting as broker or agent may be a partner as to third persons, which he certainly is if held out to them either in words or by acts in

that cargo, subject to the account which we hear of in these cases." And again, in the same case, p. 411: "It is clear that a man may not be a partner as between himself and another, though he must be so considered with reference to third persons; but was it ever decided that, on the ground that he is a partner as to third persons, he has a property in the effects of the partnership?" *Ex parte* Rowlandson, 1 Rose, 89. So in Blanchard *v.* Coolidge, 22 Pick. 151, where a father and son entered into an agreement by which the father was to carry on business in the name and on the account of the son, and to receive half the profits as compensation for his services. A separate creditor having attached certain property purchased under this agreement, *held*, that the attachment was tortious. By the court, Wilde, J., giving the opinion: "But it is not necessary to decide in the present case whether Nathaniel Blanchard is liable as a partner or not. For, admitting that he is so liable, it does not follow that he has any interest in the stock, which was attachable by his separate creditors, for the security of debts contracted before his connection with the plaintiff in business." Further: "But there is another objection to the defence, which is equally conclusive. By the agreement between the plaintiff and his father, the stock was to be the property of the plaintiff, and his father in no event to have any title to it. He could claim only his share in the profits, and had no right to appropriate to his own use any part of the capital stock." See, to the same effect, Bartlett *v.* Jones, 2 Strobh. 471.

(*l*) Smith *v.* Watson, 2 B. & C. 401. The leading facts of the case, and the points of difference between it and Reid *v.* Hollinshead, cited *supra*, p. *47, note (*i*), are thus stated by Abbott, C. J., in his opinion in that case, 4 B. & C. 878: "It is true that the plaintiffs in their first letter stipulate that Davidson & Co. shall act in the business free of commission, and this circumstance was relied on as making the present case parallel to that of Smith *v.* Watson; but the facts of the two cases are very different. In that case, it was stated to have been agreed between Sampson, a merchant, and Gill, a broker, that Sampson should buy whalebone through Gill as his broker, and that, as a remuneration for his trouble, Gill should receive one-fourth of the profits arising from the sale, and bear one-eighth proportion of the losses. Goods were bought under this agreement, which produced a profit. After the close of the transactions under it, Sampson entered into other speculations, and continued to employ Gill as a broker; and upon these Gill was to receive one-third of the profits, but whether he was to bear any portion of the losses did not appear. All the witnesses state that Sampson employed Gill as a broker, and never spoke of him otherwise than as his agent. Upon this state of facts it was *held*, that Gill had no interest in the goods, and rightly so; for upon the evidence it plainly appeared that the share of the profits was merely a substitute for the broker's commission, intended probably to stimulate the exertions of Gill in buying and selling to the greatest advantage. In the present case, Davidson & Co. were not brokers; the correspondence is, in our opinion, the language of persons to be jointly interested in the purchase as well as the sale of the goods."

such a way as to justify their considering him as a partner, while in reference to * the merchant himself he has only the rights which spring from his employment and the bargain for his compensation, because he himself knows precisely how this is. * 51

Nor would the merchant or party supplying funds have any other rights as to him who uses them. Thus, if, in such an arrangement, it was provided that one should find all the money, and the other do all the work, and that the profits should be divided, and the transaction resulted in no profit whatever, but in a considerable loss, — the party supplying funds would be obliged to sustain the whole of this loss: he could not call on the other party to contribute to him any portion of it: for, as *between themselves*, they were partners only as to profits, although the person buying and selling might have been liable *in solido*, as a partner, for the debts incurred by the purchase, or for the transport or sale of the merchandise. (*m*)

It is now quite settled that one acting for another as agent or servant does not become a partner with liabilities as such, merely by receiving a certain proportion of the profits as his compensation, and should not join or be joined in an action as partner. (*mm*) But it is said that an agreement for a division of profits raises a presumption of partnership. (*mmm*)

It not unfrequently happens, that persons enter into partnership without knowing it; that is, they make a bargain together, without knowing that it creates or involves a partnership, and subjects them to the law of partnership. This occurs most frequently when the agreement relates to a single transaction, or to one or two only. There is a common impression that nothing is a partnership at law which does not cover the whole ground of some kind of business; but this is not so. If, for example, one has goods in the hands of a factor or commission merchant, and he and another person enter into an agreement for a valid consideration to share the profit and loss

(*m*) Heran *v.* Hall, 1 B. Mon. 159. See Irving *v.* Excelsior Fire Ins. Co., 1 Bosw. 507; Hitchings *v.* Ellis, 12 Gray, 449; Newbrau *v.* Snider, 1 West Va. 153; Lamb *v.* Grover, 47 Barb. 317; Miller *v.* Price, 20 Wis. 117.

(*mm*) Lewis *v.* Greider, 49 Barb. 606. See *post*, ch. 6, § 2.

(*mmm*) Niehoff *v.* Dudley, 40 Ill. 406.

of those goods, this constitutes them partners; and the rule has been applied in such a case, where the owner of the goods agreed to guarantee to the other party the solvency of the commission house. (*n*) So persons associating, and
* 52 * contributing money to obtain a bill for a railroad, in Parliament, were held to be partners in this enterprise. (*o*) A known and acknowledged partnership, doing a regular business, may enter into a bargain for purchase, sale, and joint profit, with a third party, in regard to some single transaction, which makes them all partners therein. In such case, the third person is not admitted into the former partnership; nor is the partnership which is created by the bargain one between the old partnership and the new man; but the members of the old partnership, and the third person, all as individuals, constitute a new partnership. (*p*)

But if two or more creditors take an assignment of their debtor's stock in trade, and agree together and with him to carry on the business and apply the profits to the payment of their debts due them, this does not of itself make them partners as between themselves. (*pp*)

There is nothing to prevent the same person from being a partner in several distinct firms. (*q*) This may involve difficult questions of fact, or perhaps of law, arising from the complication of interests, especially in case of bankruptcy. (*qq*) A

(*n*) Salomons *v.* Nissen, 2 T. R. 674. So, if two mercantile houses recommend consignments to each other, and divide the gross commissions on all sales of goods so recommended, *quoad hoc* they are partners. Cheap *v.* Cramond, 4 B. & Ald. 663. So, also, where two jointly undertake to procure a cargo for a vessel, the commission therefor to be divided between them. Bovill *v.* Hammond, 6 B. & C. 149. And where D. & W. were owners of a quantity of salt, taken to secure themselves against their joint liability as indorsers of a note, and by agreement between them D. took the salt to market to sell on joint account, and did sell it, and the proceeds were applied for the joint benefit, it was *held*, that D. & W. were partners in this transaction. Cumpston *v.* McNair, 1 Wend. 457. In like manner, if the proprietors of separate lines of stage-coaches hire and keep a stable in common for their coach horses, and employ and pay a hostler at their joint expense, a partnership exists between them for these purposes. Ripley *v.* Colby, 3 Fost. 438. See Bentley *v.* White, 3 B. Mon. 268; Benson *v.* M'Bee, 2 McMull. 91.

(*o*) Holmes *v.* Higgins, 1 B. & C. 74.

(*p*) *Ex parte* Gellar, 1 Rose, 297.

(*pp*) Taylor *v.* Herring, 10 Bosw. 447.

(*q*) Swan *v.* Steele, 7 East, 210; Bosanquet *v.* Wray, 1 B. & C. 597; Elderkin *v.* Winne, 1 Chand. 27.

(*qq*) See *post*, ch. 8, § 3; and Steele *v.* Stuart, Law Rep. 2 Eq. Cas. 84.

firm cannot sue a firm, if one person is a partner in both. But one member of a firm may sue another firm of which his co-partners were members, on a covenant executed to him by that firm. (*qqq*) Some of these questions we shall hereafter consider, when we treat of bankruptcy and the settlement of a partnership estate. It seems, however, not only that a member of one partnership may become a member of another, but a member of one firm may enter into such a bargain with a third party, in respect to the interest of the first in the stock, business, or profits of his partnership, as shall constitute this third person and himself partners as to the interest of the first, although the partnerships are entirely distinct, the new from the old, and the third person acquires no rights and incurs no obligations in reference to the first partnership. (*r*)

(*qqq*) Mullany *v.* Kernan, 10 Iowa, 224.

(*r*) To this effect is the language of Eyre, C. J., in Bolton *v.* Puller, 1 B. & P. 546: "There can be no doubt, that, as between themselves, a partnership may have transactions with an individual partner, or with two or more of the partners having their separate estate engaged in some joint concern in which the general partnership is not interested; and that they may by their acts convert the joint property of the general partnership into the separate property of an individual partner, or into the joint property of two or more partners, or *e converso*. And their transactions in this respect will, generally speaking, bind third persons, and third persons may take advantage of them in the same manner as if the partnership were transacting business with strangers; for instance, suppose the general partnership to have sold a bale of goods to the particular partnership, a creditor of the particular partnership might take those goods in execution for the separate debt of that particular partnership. In some respects, therefore, an individual partner, or a particular partnership consisting of two or more of those persons, who are partners in some larger partnership, may be considered as third persons in transactions in which the general partnership may happen to be engaged with their correspondent." The court proceeded upon the same principle in Brown *v.* De Tastet, Jac. 284. There A., B., and C. being in partnership, A. agreed with D. to give him a moiety of his share in the firm. It was *held*, that an account might be decreed between A. and D. without making B. and C. parties. See Glassington *v.* Thwaites, 1 Sim. & S. 124. In *Ex parte* Barrow, 2 Rose, 255, the two Slyths, father and son, were in partnership. They agreed to dissolve; that the affairs of the partnership should be settled by arbitration; and that Slyth the younger should have one-third out of the profits of the business, until some situation should be found for him. The affairs of the partnership were never adjusted; but, shortly after, Slyth the elder, who remained in possession of the effects of the firm, formed a new partnership with Gyles. A commission of bankruptcy having issued against the two Slyths, their assignees took possession of the effects of Slyth and Gyles, to an amount more than sufficient to pay the creditors of that firm. The question in the present case was to whom the surplus belonged, whether to the joint creditors of Slyth the elder and

*53 *If the new partnership becomes insolvent, it would affect the old partnership only as the insolvency of any member thereof would. (*s*) If a person belongs to two firms, he may transfer to the credit of one of them his interest in the other, against the wishes of his partners in the second firm; nor would this necessarily operate a dissolution of the second firm. (*ss*) But it is so obvious that such complicated arrangements may bring upon the parties great inconvenience and embarrassment, that they will continue to be very rare, even if they take place at all.

Where property is left to two or more persons by a will, in such a way that they would take it as joint tenants, or as tenants in common, and they take it as partners, and continue to hold and use it as partnership stock, their rights to and in the property, and against each other in relation to the property, are governed by the law of partnership. (*t*) To this it may

Slyth the younger, or to the separate creditors of Slyth the elder. The court *held*, that it was the separate property of Slyth the elder. Lord Chancellor Eldon, in the course of his opinion, said: "Now Slyth the son was no partner in this (the new) partnership; for although Slyth the father might be obliged to give one-third of his profits to Slyth the son under this arrangement, yet I take it to have been long since clearly established, that a man may become a partner with A., where A. and B. are partners, and yet not be a member of that partnership which existed between A. and B. In the case of Sir Charles Raymond, a banker in the city, a Mr. Fletcher, agreed with Sir Charles Raymond that he should be interested so far as to receive a share of his profits of the business, and which share he had a right to draw out of the firm of Raymond & Co. But it was held that he was no partner in that partnership, had no demand against it, had no account in it, and that he must be satisfied with a share of the profits arising and given to Sir Charles Raymond." See Freligh *v.* Miller, 16 La. Ann. 418.

(*s*) See preceding note.

(*ss*) Russell *v.* Leland, 12 Allen, 349.

(*t*) Jackson *v.* Jackson, 7 Ves. 535. Same case on Appeal, 9 Ves. 591. In this case, personal property, including leaseholds, property in trade, &c., was left to A. & B., as residuary legatees. By both the Master of the Rolls, and the Lord Chancellor on appeal, it was *held*, that they took it originally as joint-tenants. But the Master thought the bequest positive, and that there were no circumstances by which he could be guided in giving to the words of the will any other than their literal import. Therefore he decreed that, on the death of A., all the property thus bequeathed, excepting a portion of the accrued profits, belonged to B., the survivor. The Lord Chancellor, on the other hand, *held*, that the will had, neither from the obvious intention, the purposes to which the testator had devoted his property, nor from any other consideration, gone the length of providing that the residuary legatees should not have any power of destroying the original joint-tenancy by their acts and agreements. A. & B. then possessing the power of severing the joint-tenancy, he *held*, that they had exercised it, both as to the capital

be said, by way of *exception, that if the will con- *54
tained distinct expressions which would give to the property the quality of joint-tenancy, even when it should be held in partnership, these words, in reference to the legatees, would take effect. (*u*)

Questions of partnership are far more frequent, and generally more important, when they arise from relations between the firm, or an alleged member of it, and third persons. These questions will be considered in the next chapter. Here we will sum up what seem to us the true principles of partnership as between the partners, as follows:—

Persons are partners in regard to each other, if each of them contributes either capital (money, merchandise, chattels, or choses in action), or credit, or skill and care, or labor, or two or more or all of these, and all the contributions are put together into common stock, to be used for the purpose of carrying on business, or for one or more business transactions, for the common benefit. (*v*)

and the profits, by acting for twelve years as partners in trade therein; and that, therefore, they were to be considered as tenants in common of the property embarked in trade, from the time they were let into possession. See 2 Hov. Supp. 66.

(*u*) As where a testator, after making considerable pecuniary and other legacies, without making any express disposition of the residue of his personal estate, constituted his two eldest sons his executors. Though the executors had carried on trade together with a portion of the residue, it was, nevertheless, *held*, that, upon the death of one of them, the whole of the residuum survived to the other. Hall *v.* Digby, 4 Bro. P. C. 224. In 9 Ves. 596, the Lord Chancellor thus states the principle upon which the case was decided: "In that case Mr. Fazakerley, Sir John Strange, and the other considerable persons who signed the reasons upon the appeal, all agreed that actual dealing in partnership with effects left to two jointly, with intent that it should be a dealing in partnership, though they had taken under the will as joint-tenants, yet having once begun to act with the property as merchants, would sever the joint-tenancy, unless the will contains something that would clothe the property, though engaged in trade, with the quality of joint-tenancy."

(*v*) The proposition of the text is illustrated by a great variety of cases. The most unmistakable, and perhaps the most common, form of partnership, is where two or more persons agree to contribute both capital and labor, and to share in both profit and loss, equally or in certain specified proportions. Such an agreement being executed, there can be no question as to the existence of a complete partnership *inter se*. See Metcalf *v.* Royal Exchange Assurance Co., Barnard. 343; Goddard *v.* Pratt, 16 Pick. 412; Green *v.* Beesley, 2 Bing. N. C. 108; Wilson *v.* Whitehead, 10 M. & W. 503; Doak *v.* Swann, 8 Greenl. 170; Griffith *v.* Buffam, 22 Vt. 181; Cumston *v.* McNair, 1 Wend. 457; Halsted *v.* Shmelzel, 17 Johns. 80; Brown *v.* Tapscott, 6 M. & W. 119; Quine *v.* Quine, 9 Smed. & M. 155; Goulé

* 55 * It is certainly not necessary that each partner should bring into the common stock both labor and property.

v. Hayward, 1 Cal. 345; Wadsworth *v.* Manning, 4 Md. 59; Emanuel *v.* Draughn, 14 Ala. 303. Where parties agree to enter into an association for the purpose of buying and selling, and carrying on a joint business, indefinitely, no stipulation for dividing profit and loss is necessary, as that is an incident to the prosecution of their joint business. Barrett *v.* Swann, 17 Me. 180. As to where there is a partnership in a patent, see Parkhurst *v.* Kinsman, 1 Blatch. C. C. 488; Penniman *v.* Munson, 26 Vt. 164. The partners need not all contribute money, nor in equal proportions. Any thing of value for the use of the partnership, as for example a license to trade, is a sufficient contribution to the joint funds. The Herkimer, Stewart Adm. 23, 24. Nor need the property itself be put into the common stock. On the other hand, the capital of a firm may consist of the mere use of property owned by the individual partners separately. Chancellor Walworth, in Champion *v.* Bostwick, 18 Wend. 183. Thus, carriers of passengers and goods sometimes divide among themselves a line of road, each of them, at separate expense, furnishing the means of transportation for a particular portion of it. If, then, they share proportionably in the profits and losses accruing from the running of the whole line, they are partners *inter se*, and the capital contributed by each is the use of the vehicles, and other property which each provides for his separate part of the route. Champion *v.* Bostwick, *supra;* Fromont *v.* Coupland, 2 Bing. 170; Cobb *v.* Abbot, 14 Pick. 289; The Steamboat Swallow, Olcott Adm. 334. See Waland *v.* Elkins, 1 Stark. 307; Wetmore *v.* Baker, 9 Johns. 307, and the comments of the court thereon in Champion *v.* Bostwick. See Cotter *v.* Bettner, 1 Bosw. 490. But if in such cases the carriers do not own the profits resulting from the whole road, as a common fund out of which each is entitled to draw a certain share, but each one of them receives only those profits and bears only those losses which accrue from his own particular piece of road, there is now no such community of interest between them as to make them partners. Mohawk & Hudson R. R. Co. *v.* Niles, 8 Hill, 162; Briggs *v.* Vanderbilt, 19 Barb. 222; Bonsteel *v.* Vanderbilt, 21 id. 26; Pattison *v.* Blanchard, 1 Seld. 186; Ellsworth *v.* Tartt, 26 Ala. 733. [Where several common carriers on a continuous route divide the proceeds of the joint transportation in an agreed proportion, this does not constitute them partners as to the carriage of the goods, there being no general agreement to share the proceeds of the whole business on all their lines. Goss *v.* N. Y. & P. R. R. Co., 99 Mass. 220.] In French *v.* Styring, 2 C. B. N. S. 357, two joint owners of a race-horse had entered into an arrangement by which one of them had the entire management of the horse, and paid in advance all the expenses of keeping, training, &c. The other co-owner was to pay a moiety of these expenses, and to share equally in the earnings. One of the questions raised in the case was, whether that agreement constituted a partnership. Cockburn, C. J.: "I think the fair result of the evidence is, that there was no partnership in the horse; but that the plaintiff and defendant were owners in common, each being entitled to an undivided moiety, — part-owners, but not partners. But, although they were not partners in the horse, I concur in the argument of the defendant's counsel that they were partners in the management and working of the horse." Crowder, J.: "There was certainly no partnership in the horse; but it is contended that there was a partnership so far as regarded the running and the managing of the horse. If that be so, then what was the capital? It consisted of the money necessary to train, feed, convey the horse to races, and

It is a familiar * principle, quite frequently put in prac- * 56
tice, that one or more of the partners may contribute money alone, while one or two others may contribute labor and money, or labor alone. (*w*) And indeed all may contribute labor, and none money. (*x*)

The principles, or rules above stated, as defining or describing a partnership, may be further illustrated by cases in which joint business transactions have been conducted, but were held not to constitute a partnership, for the want of some essential ingredient, as where the contributions of all the parties were not mingled into common stock. (*y*) So where the capital

other matters; that is, of the money necessary to be expended to put the horse in a condition to win his stakes." See *ante*, page * 48, note (*j*), for further illustrations of partnerships in which the use of property alone constitutes the capital. See also Bulfinch *v.* Winchenpack, 3 Allen, 161.

(*w*) Reid *v.* Hollinshead, 4 B. & C. 867; *Ex parte* Chuck, 8 Bing. 469; Candler *v.* Candler, 6 Madd. 141; Bovill *v.* Hammond, 6 B. & C. 149; Dob *v.* Halsey, 16 Johns. 34; Gregg Township *v.* Half-Moon Township, 2 Watts, 342; Simpson *v.* Fetz, 1 McCord Ch. 213; Potter *v.* Moses, 1 R. I. 430; Winship *v.* Bank of the United States, 5 Pet. 529; Tibbatts *v.* Tibbatts, 6 McLean, 80; Brace *v.* Washburn, 43 Me. 564; Wood *v.* Vallette, 7 Ohio St. 122. See Dwinel *v.* Stone, 30 Me. 384.

(*x*) Not only may one partner contribute labor alone to the joint undertaking, but the contributions of all the partners, and the whole capital of the firm, may consist substantially of personal services, as is generally the case in professional partnerships between solicitors, physicians, &c. See Tench *v.* Roberts, 6 Madd. 145, note (*a*). So where two commission houses, one in London, the other in Rio Janeiro, in accordance with mutual stipulations, recommend customers to each other, and divide equally the commissions on the sale of all goods thus recommended by the one house to the other, *quoad hoc* they are partners, the capital of the partnership being the partners' mutual exertion of influence in each other's favor. Cheap *v.* Cramond, 4 B. & Ald. 663. See Dix *v.* Otis, 5 Pick. 38.

(*y*) In Smith *v.* Wright, 5 Sandf. 113, two mercantile houses had carried on a joint business under the following arrangement: Each firm agreed, in its own name and with its own funds, to make purchases and sales of flour and other produce. But all such contracts were to be made for the joint account and benefit of the two firms, who were to share equally in the profits and losses resulting from the separate dealings of each firm in this particular line of business. Upon the question whether this agreement constituted the parties to it partners, Sandford, J., said: "There was no union of funds contemplated by the agreement. Each firm was to make and fulfil its own contracts. There was no union of services, because it might so happen that one of the firms would be unable, or deem it unwise, to make any contracts at all; and yet, in the absence of bad faith, it would participate in the profits, and would certainly be liable to share the losses of the contracts made by the other firm. The whole effect of the agreement was to bind two distinct mercantile houses, acting in their own names, separately and independently of each other, to share the profits and losses, when they should be ascertained, arising from one particular department of their

*57 and labor employed * were not combined together for business purposes and a common profit. (z) And it seems that there is a difference between an enterprise undertaken by a number of persons jointly, with the intent thereby to diminish a loss, and one for the sake of profit, properly speaking. (a) The capital may be, and remain throughout the partnership, the property of only a part of the partners; (b) but all must own in community the profits resulting from the business. (c)

trade. We think that this did not constitute the two firms copartners in the contracts, which the respective separate firms made in the transaction of that portion of their business." Benson *v.* M'Bee, 2 McMullen, 91.

(z) Thus a deed of assignment by a debtor of all his property to trustees for the benefit of creditors, containing a clause by which the trustees are authorized to carry on the trade of the debtor, will not make the creditors who sign the deed partners, if the carrying on of the business is merely auxiliary to winding up the debtor's affairs, and has in view merely the realization of his property. Otherwise, if the object of the deed is to carry on the trade in a spirited and extensive manner, for the purpose of making a profit for the parties to it. Owen *v.* Body, 5 Ad. & El. 28; Janes *v.* Whitbread, 11 C. B. 406, 5 Eng. L. & Eq. 431; Coate *v.* Williams, 9 id. 481; Hickman *v.* Cox, 18 C. B. 617, 36 id. 400, 3 C. B. N. S. 523.

(a) As where underwriters, having separately insured, and separately accepted an abandonment of a vessel, then unite in prosecuting the original voyage, "it is carrying the general principle too far to consider them in the light of common partners," since they take the vessel only for the purpose of diminishing a loss, and with no other view than to sell her at its termination. Livingston, J., in United Ins. Co. *v.* Scott, 1 Johns. 112. So, where a debtor, in consideration of his indebtedness, transfers the control of his business to his creditors, the latter to receive a large share of the profits until the indebtedness of the former shall be reduced to a specified amount, the debtor and his creditors are not partners. Brandred *v.* Muzzy, 1 Dutch. 268. See Price *v.* Groom, 2 Exch. 542.

(b) See last note; also *ante*, p. *44 and note (c). Where partners in a mercantile house enter into an arrangement by which they admit other parties to share in their present profits and losses, and further agree, at the end of a certain period and upon certain considerations, to transfer to those parties certain shares in the capital, such present participation in the profits, with a right to the use of the capital, and an inchoate title to it, constitutes a full partnership. Vassar *v.* Camp, 14 Barb. 341.

(c) The courts have not perhaps precisely defined a partner's interest in accruing profits, as an ownership of them. But it is evident that in all cases of actual partnership, such is the fact. Further, an ownership of a part of the capital of a firm will not alone make a man a partner, nor the mere reception of a share of the profits of a trade. But if there be an ownership of the profits, while they are profits, that one circumstance alone will constitute a complete partnership. See p. *44 and note. Hence, a joint ownership of profits seems to be the real test of partnership, since it is that thing which by itself is sufficient to constitute an actual partnership, and without which none ever exists. And in some cases this criterion of partnership appears to be recognized by the courts. Thus, in Bond *v.* Pittard, 3

* It should be added, that whether two or more persons * 58 are partners *as to each other* must generally, and perhaps always, be determined by the intention of the parties, as the same is expressed in the words of their contract, or may be gathered from the acts and from all the circumstances which are available for the interpretation or construction of the contract. (*d*)

M. & W. 357, G. F. Watts & P. H. Watts carried on business as attorneys and solicitors, under an agreement by which P. H. Watts was to receive in the first place, out of the profits of the business, the sum of 300*l.* annually. But he was not to be liable for any losses, and was to have a lien on profits to indemnify him for any losses he might sustain, by reason of his liability as partner, to third persons. G. F. Watts being bankrupt, the question was whether his assignees and P. H. Watts could join in an action against the defendant for the price of work and labor done. Parke, B. —— "To whom would this money belong if recovered? — It would belong to both till the end of the year, when the amount of profits would be ascertained; and then in one event 300*l.* would be due to P. H. Watts, and the other would be entitled to the balance." Again: "I have no doubt that the contract could have been entered into by both the Messrs. Watts, whether they were partners or not; and, if it were, both would be entitled to sue. If it were entered into by one only, then the question would be, whether the other was jointly interested in the contract. According to the agreement between them, it appears that Philip Henry Watts was to receive 300*l.* a year *out of the profits*, that is, out of the net profits, which could not be ascertained until a view was taken of the real state of the accounts at the end of the year. But in the mean time, doubtless the money recovered in this action would be the joint property of both, and would go into the general fund for the benefit of both, until that state of things should arise when a division would take place, *and for this reason* I am of opinion that in this case the contract is with both." See Wish *v.* Small, 1 Camp. 331; Barry *v.* Nesham, 3 M., G. & Sc. 657, opinion of Maule, J. In subsequent notes the subject is discussed at greater length.

(*d*) Hence, if persons who unite in a joint undertaking expressly declare that they do not mean to become partners, the law will not hold them partners as to each other, unless the actual relations into which they enter neutralize and negative their declarations. Gill *v.* Kuhn, 6 S. & R. 337; Kerr *v.* Potter, 6 Gill, 404; Gilpin *v.* Enderby, 5 B. & Ald. 954; [Freeman *v.* Bloomfield, 43 Mo. 391.] But the controlling influence which the courts give to the intention of the parties, in questions of this kind, is best illustrated by a large class of cases in which the inquiry is, whether *as between themselves* a person who receives a share of the profits is a partner with another person, or only his agent and servant. Thus, if A. & B. are engaged in a particular trade, of which A., who finds capital, receives a part of the profits, and B., who manages the business, receives another part, the real relation between A. & B. may be that of partners, or that of principal and agent, and can be determined only by discovering from the whole character of their connection the intention with which they formed it. Thus, in Muzzy *v.* Whitney, 10 Johns. 226, A. & B. had agreed with a turnpike corporation to build and complete a certain road. They afterwards contracted with C. "to let him have a share of the profits, if any, in making the second ten miles

of the road, in proportion to the help he afforded in completing the same, the one-half of it to be taken from A.'s part, and the other from B.'s part." It was held that this agreement constituted no partnership between the parties, but only appeared to be a mode of paying C. for his help and labor. In Rawlinson *v.* Clarke, 15 M. & W. 292, A., a surgeon and apothecary, sold out his business to B., and further agreed to employ himself for a year in transferring his business to B., — in consideration whereof B. agreed to give A. during the year a moiety of the clear profits of the trade. *Held*, that by this agreement A. & B. were not made partners; and that, upon a view of the whole deed, it would bear no other construction than that A. was to receive nothing more than a salary for the services he was to afford to B., in helping him to continue the business. See Salter *v.* Ham, 31 N. Y. 321. In Stocker *v.* Brockelbank, 3 Mac. & G. 250; 5 Eng. L. & Eq. 67; the main question was whether the plaintiff and the defendants were partners. The defendants were licensees of a patent, and, with the view of exercising and making a profit out of their patent privilege, entered into a contract with the plaintiff for the management of their business. By the deed executed by the parties, the defendants were to furnish all the capital, and the plaintiff was to manage and generally superintend the business; receiving therefor by way of compensation and as "salary" a "sum of money equal to 40 per cent upon the net profits." The deed everywhere and in a careful and studied manner excluded the plaintiff from any interest in the profits. His remuneration was always spoken of as his "salary," and it was further declared that the contract should not inure as a contract of partnership, and that the word "partners," when used in the deed, should be held to apply solely to the defendants. There were also other provisions as to what should be done on the happening of certain contingencies. The Lord Chancellor, in deciding the question of partnership, considered it material to take into consideration the whole character of the agreement between the parties; to examine the general state of the business, the nature of the plaintiff's interest given him by the deed, the nature of his remuneration, and the nature of his service. In conclusion of this part of the case, he said: "I have stated the nature of the parties' interests; I have stated the nature of the services, and the express declaration that no partnership should arise out of the contract. Does, then, the interest which the party had in the amount of the profits (because his remuneration was to be measured by that amount) constitute him a partner? I think it does not, and I think the authorities are decisive. . . . I therefore am clearly of opinion that in this case there was no partnership; that it was simply a contract of hiring and of service, the remuneration to be measured with reference to the amount of the profits of the business." So, in Hazard *v.* Hazard, 1 Story, 371, where A. allowed to B., for his services, one-third of the profits of his business for one year, and one-fourth for another; the court *held*, that the parties, not having intended by this agreement to become partners, did not become so, and that B.'s share of the profits was merely a mode of paying him for his services as agent. See, to the same point, Wilkinson *v.* Frazier, 4 Esp. 182; Mair *v.* Glennil, 4 M. & S. 240; Geddes *v.* Wallace, 2 Bligh, 270; Baxter *v.* Rodman, 3 Pick. 435; Ross *v.* Drinker, 2 Hall, 415; Allen *v.* Dunn, 15 Me. 292; M'Arthur *v.* Ladd, 5 Ohio, 431; Motley *v.* Jones, 3 Ired. 144; Kellogg *v.* Griswold, 12 Vt. 291; Stearns *v.* Haven, 16 id. 87; Mason *v.* Potter, 26 id. 722; Norment *v.* Hull, 1 Humph. 320; Lowry *v.* Brooks, 2 McCord, 421; Bull *v.* Schuberth, 2 Md. 38; Wilkinson *v.* Jett, 7 Leigh, 115; Potter *v.* Moses, 1 R. I. 430; Nutting *v.* Colt, 3 Halst. Ch. 539; Ogden *v.* Astor, 4 Sandf. 311; Price *v.* Alexander, 2 Greene, 427; Goode *v.* McCartney, 10 Texas, 193. The case of Tench *v.*

Roberts, 6 Madd. 145, note, at first sight seems to hold that persons may be made partners *inter se*, contrary to their avowed and real intentions. There the contract of the parties was in this form: "Mr. Gregory Roberts and Mr. James Tench agree as follows: Mr. James Tench to become an assistant to Mr. Roberts, and to take one-third part of the profits of the business, by way and in lieu of a salary; not to be considered as a partnership. Mr. Roberts agrees to allow Mr. Tench the above for his share as an assistant." The Vice-Chancellor *held*, that this agreement constituted a partnership which was contrary to statute (22 Geo. 2, ch. 46, § 11), as being between an attorney and an unqualified person; and that the necessary and legal effect of the agreement, and the policy of the statute, could not be escaped by the declaration of the party that a partnership should not be constituted. But the case is not necessarily to be regarded as deciding that there was a partnership between the parties to the above contract, though they were also the only parties to the present suit. According to the common understanding of *Ex parte* Hamper, 17 Ves. 404, to which case the court referred as its authority, an agreement of the above nature would undoubtedly have made the parties partners as to third persons. Consequently the decision in this case may be regarded as only declaring that a contract between an attorney and an unqualified person, which, being executed, made them partners as to third persons, was as much forbidden by the statute of Geo. 2, ch. 46, § 11, as one which made such persons partners as to each other. See further, in illustration of the general principle, Hesketh *v.* Blanchard, 4 East, 144; Gibson *v.* Lupton, 9 Bing. 297; Bailey *v.* Clark, 6 Pick. 372; Drake *v.* Ramey, 3 Rich. 37; McCauley *v.* Cleveland, 21 Miss. 438; Taylor *v.* Perkins, 26 Wend. 124; Hawes *v.* Tillinghast, 1 Gray, 289; Chase *v.* Barrett, 4 Paige, 148; French *v.* Price, 24 Pick. 19; Moore *v.* Smith, 19 Ala. 774; Olmstead *v.* Hill, 2 Ark. 346; Newman *v.* Bean, 1 Fost. 93; Barnett *v.* Smith, 17 Ill. 565.

CHAPTER VI.

WHO ARE PARTNERS AS TO THIRD PARTIES.

SECTION I.

GENERAL GROUNDS OF LIABILITY.

As we have seen that it is one of the essential qualities of partnership that upon each partner rests an absolute liability for the whole amount of every debt due from the partnership, it is of the utmost consequence, both to the creditors of a partnership and to actual or alleged members of it, to determine with certainty who they are upon whom this liability rests; or, in other words, who are partners in respect to third parties dealing with the firm. And this question is sometimes as difficult as it is important. It will be seen, as we go farther in this chapter, that the authorities are quite irreconcilable, and that it is extremely difficult to draw from them distinct and certain principles or rules. It is certain that persons may be held as partners as to third parties, who would not be deemed partners as between themselves. (*aa*)

The first thing to be remembered is, that persons may be charged as partners of a firm on either one of two perfectly distinct grounds, to both of which we have already referred. One of these is, that the person actually is a partner. The other is, that he has, with his own knowledge and consent, been held forth as a partner, to the person having a claim, or to the public generally. In the great majority of cases these two causes unite; that is, he is held forth as a partner who

(*aa*) Grieff *v.* Boudousquie, 18 La. Ann. 631. [A person may be so negligent as to be estopped to deny that a person who is managing his property is acting by his authority, and may be held as partner, even though there be no community of interest or participation in profits. *In re* Jewett, 15 N. B. R. 126.]

actually is one. The secret partner, on the one hand, or the merely nominal partner, on the other, are exceptions to the prevailing custom; but such exceptions do occur, and not very unfrequently: and then the question is, What are the rules of law in regard to them?

The first which we state is, that the liability of a partner is fastened upon any person just as absolutely, and to all intents and purposes, by either one of these causes alone, as by both of them * together. And the reason is obvious. * 62 If a man is in fact a partner in a mercantile or other partnership, the mere circumstance that he has been able to conceal this partnership from the world affords no reason whatever why he should not share in the liabilities of the known partners. (*a*) We hold that a secret partner is

(*a*) That one who is a partner in fact, though not known to be so, is liable upon all the partnership engagements to the same extent as though his name had never been concealed, is one of the oldest and best-established doctrines of partnership law. In Hoare *v.* Dawes, 2 Doug. 371, Lord Mansfield said: "I considered them at first as a sort of dormant partners. The law with respect to them is not disputed, namely, that they are liable when discovered, because they would otherwise receive usurious interest without risk." And in Saville *v.* Robertson, 4 T. R. 725, Lord Kenyon, C. J., said, "It is clear that if all these parties had been partners at the time when these goods were furnished, though that circumstance were not known to the plaintiff, they would all have been liable for the value of the goods. It is equally clear that such an action might be maintained against the dormant partners alone, unless they pleaded in abatement." Coope *v.* Eyre, 1 H. Bl. 48; Gonthwaite *v.* Duckworth, 12 East, 421; Swan *v.* Steele, 7 id. 210; *Ex parte* Raleigh, 3 Mont. & Ayr. 670; Evans *v* Drummond, 4 Esp. 89; *Ex parte* Gellar, 1 Rose, 297; Dyke *v.* Brewer, 2 C. & Kir. 828. The whole doctrine on the subject is thus stated by Marshall, C. J., in Winship *v.* Bank of the United States, 5 Pet. 561; "Partnerships for commercial purposes, for trading with the world, for buying and selling from and to a great number of individuals, are necessarily governed by many general principles, which are known to the public, which subserve the purpose of justice, and which society is concerned in sustaining. One of them is, that a man who shares in the profits, although his name may not be in the firm, is responsible for all its debts. Another more applicable to the subject under consideration is, that a partner, certainly the acting partner, has power to transact the whole business of the firm, whatever that may be, and, consequently, to bind his partners in such transactions as entirely as himself. This is a general power, essential to the well conducting of business, which is implied in the existence of a partnership. When, then, a partnership is formed for a particular purpose, it is understood to be in itself a grant of power to the acting members of the company to transact its business in the usual way. If that business be to buy and sell, then the individual buys and sells for the company; and every person with whom he trades, in the way of its business, has a right to consider him as the company, whoever may compose it. It

*63 *liable upon all the acting partner's contracts made within the usual scope of the partnership business, whether such contracts are *really* on partnership account or not. It might perhaps be said, that as no credit is given to the secret partner, and as his liability is wholly founded upon his interest, if it were shown that in fact he had no interest in

is usual to buy and sell on credit; and, if it do so, the partner who purchases on credit in the name of the firm must bind the firm. This is a general authority held out to the world, to which the world has a right to trust. The articles of copartnership are perhaps never published. They are rarely if ever seen, except by the partners themselves. The stipulations they may contain are to regulate the conduct and rights of the parties as between themselves. The trading world, with whom the company is in perpetual intercourse, cannot individually examine these articles, but must trust to the general power contained in all partnerships. The acting partners are identified with the company, and have a right to conduct its usual business in the usual way. This power is conferred by entering into the partnership, and is perhaps never to be found in the articles. If it is to be restrained, fair dealing requires that the restriction should be made known. These stipulations may bind the partners, but ought not to affect those to whom they are unknown, and who trust to the general and well-established commercial law. See Richardson *v.* Farmer, 36 Mo. 35.

"The counsel for the plaintiff in error supposes, that, though these principles may be applicable to an open avowed partnership, they are inapplicable to one that is secret. Can this distinction be maintained? If it could, there would be a difference between the responsibility of a dormant partner, and one whose name was to the articles. But their responsibility, in all partnership transactions, is admitted to be the same. Those who trade with a firm on the credit of individuals whom they believe to be members of it, take upon themselves the hazard that their belief is well founded. If they are mistaken, they must submit to the consequences of their mistake; if their belief be verified by the fact, their claims on the partners, who were not ostensible, are as valid as on those whose names are in the firm. This distinction seems to be founded on the idea, that, if partners are not openly named, the resort to them must be connected with some knowledge of the secret stipulations between the partners, which may be inserted in the articles. But this certainly is not correct. The responsibility of unavowed partners depends on the general principles of commercial law, not on the particular stipulation of the articles." s. c. 5 Mason, 176; Armstrong *v.* Hussy, 12 S. & R. 315; Mifflin *v.* Smith, 17 id. 165; Graeff *v.* Hitchman, 5 Watts, 454; Given *v.* Albert, 5 W. & S. 333; Bisel *v.* Hobbs, 6 Blackf. 479; Braches *v.* Anderson, 14 Mo. 441; Church *v.* Sparrow, 5 Wend. 223; Baxter *v.* Clark, 4 Ired. 127; Everitt *v.* Chapman, 6 Conn. 347; Reynolds *v.* Cleaveland, 4 Cow. 282; Kelley *v.* Hurlburt, 5 id. 534; *In re* Warren, Daveis, 324; Hadfield *v.* Jameson, 2 Munf. 66; Grosvenor *v.* Lloyd, 1 Metc. 19; McDonald *v.* Millandon, 5 Louis. 406, 408; Lea *v.* Guice, 13 S. & M. 656; Smith *v.* Smith, 7 Fost. 244; Brooke *v.* Washington, 8 Gratt. 248; Hill *v.* Voorhies, 22 Penn. 680; Griffith *v.* Buffum, 22 Vt. 181; Pratt *v.* Langdon, 12 Allen, 544. A secret partner cannot avoid his liability to creditors, by showing, that, according to the law of the place where it was made, the contract of partnership as between the parties was void. Oakley *v.* Aspinwall, 2 Sandf. 7.

a particular transaction, he ought not to be bound with reference to it, even though it were apparently within the regular course of the business carried on by the partnership. And there are cases in which the court seems to adopt this view. But we think the rule we have above stated rests upon the better reason and the stronger authority. (*b*) It * has * 64

(*b*) In Etheridge *v.* Binney, 9 Pick. 272, where the two Binneys and John Winship carried on the manufacture of soap and candles in partnership, but in the name of John Winship alone, the principal question in the case being whether the Binneys were liable for moneys borrowed by Winship, the court instructed the jury that "the name of the firm here being only the name of the individual, a note offered in that name, unaccompanied by any representation, would of course import only a promise of John Winship alone; and the credit being given to him alone, the creditor would not recover against the firm, without proving that the money actually went into the funds of the firm. But if the borrowing partner states that he is one of a company, and that he borrows money for the company, or purchases goods for their use, then, as there is such company, and as they have given him authority to use the company credit to a certain extent, and as the creditor will have no means of knowing whether he is acting honestly towards his associates or otherwise, and he lends the money or sells the goods on the faith of such representation, the company will be bound, unless they prove that the contract was for his private benefit, and known to be so by the creditor." [When two persons, under a private agreement, become partners as to third parties, the contract specifying no firm name, but allowing each partner to purchase goods on his own individual credit, — one to transact the business, and the other to be unknown, — the dormant partner is not liable on a note for goods put into the concern by the other, and by him signed in his own name; the signature not being intended as the firm signature, and the payee not having reason to suppose it to be such. Palmer *v.* Elliot, 1 Clif. C. Ct. 63. See also Mercantile Bk. *v.* Cox, 38 Me. 500. But see Hendrick *v.* Gunn, 35 Ga. 234.] In Lloyd *v.* Ashby, 2 C. & P. 138, assumpsit was brought on a bill of exchange, accepted by "Ashby & Rowland." The question was whether Shaw, a dormant partner with Ashby & Rowland, was liable on the above acceptance. Shaw was not known as a partner, nor did his name appear in the partnership transactions. The bill in question was accepted in a matter having no relation to the partnership business. Abbott, C. J.: "If Shaw had been known to be a partner, I should have held that it was taken on his credit; and that, unless there was fraud in the plaintiff, he would be entitled to recover on it against Shaw; but as the plaintiff did not know that Shaw was a partner, and as he could not have taken the bill on Shaw's credit, I am of the opinion that the plaintiff cannot recover. I ground myself on these circumstances, that Mr. Shaw was an unknown partner, and that the bill was not accepted for a debt from him, but for the raising of money from which he had no benefit." See also Young *v.* Hunter, 4 Taunt. 583, opinion of Gibbs, J.; *Ex parte* Bolitho, Buck, 100. See Miller *v.* Mainee, 6 Hill, 114. But the doctrine of these decisions is certainly controverted by better considered and more weighty adjudications. Lloyd *v.* Ashby, *supra*, was afterwards reconsidered in the King's Bench; and the court were of opinion that the plaintiff was entitled to recover, and a new trial was granted. 2 B. & Ald. 23. The principle of the decision in Vere *v.* Ashby, 10 B. & C. 288, is the same with that in 2 B. & Ald. 23; and in Wintle *v.* Crowther, 1 C. & G. 316,

been held that a judgment obtained against an ostensible partner, upon a note given by him in his own name in
* 65 the course * of the partnership business, his copartner being unknown to the creditor, was no bar to a joint action upon the same note against both the ostensible and the secret partner. (*c*) But we think this doctrine opposed to the weight of American authority; and upon the ground that a partnership debt is, in this respect, joint only, and not joint and several, a judgment against the ostensible partner or partners, though unsatisfied, may be pleaded in bar to a subsequent suit upon the same cause of action, where both the ostensible and the secret partners are joined as defendants. (*d*) It has, how-

Bayley, B., referring to the above cases, said: "Notwithstanding these cases, we are of opinion, that when a partnership name is pledged, the partnership, of whomsoever it may consist, and whether the partners are named or not, and whether they are known or secret partners, will be bound, unless the title of the person who seeks to charge them can be impeached." See Nichols *v.* Chears, 4 Sneed, 229. In Ross *v.* Decy, 2 Esp. 469, the action was for goods sold and delivered; plea set off. The plaintiffs entered into partnership as grocers, Ross to keep the shop in his own name only. He sold to the defendant the goods for the price of which the present action was brought. The defendant had done business for Ross on his separate account to a greater amount than the demand now made against him by the partnership; and this he offered to set off. Lord Kenyon was of opinion that the set-off was good. His lordship said, the plaintiffs had subjected themselves to it, by holding out false colors to the world, by permitting Ross to appear as the sole owner; that it was possible the defendant would not have trusted Ross only, if he had not considered the debt due to himself as a security against the counter demand. Furthermore, not only is a secret partner bound by all transactions within the scope of the partnership business, whether on partnership account *in fact* or not, but in Robinson *v.* Wilkinson, 3 Price, 538, it is said to be "clear law that a dormant partner cannot discharge himself from liability to pay the debts of a creditor through the medium of his ostensible partner by any acts of his during the concealment of the unknown partner." There, Wilkinson was a secret partner with Cay in a vessel. The plaintiff supplied the vessel with stores on the credit of Cay; took Cay's sole bills for the amount of his debt; allowed him to renew them when due, and afterwards, Cay proving insolvent, compounded with him for the unpaid portion of the debt, and received as security the acceptance of a third person. But the fact of Wilkinson's interest in the ship being unknown to the plaintiff during the time of these several transactions, it was *held* that he was not discharged by any thing that had taken place. A similar decision was made in Chamberlain *v.* Madden, 7 Rich. 395.

(*c*) Sheehy *v.* Mandeville, 6 Cranch, 253 [overruled in Mason *v.* Eldred, 6 Wall. (U. S.) 231]. See Van Ness *v.* Forrest, 8 id. 30; Watson *v.* Owens, 1 Rich. 111; Brozel *v.* Poyntz, 3 B. Mon. 178; Scott *v.* Colmesuil, 7 J. J. Marsh. 416; Dennett *v.* Chick, 2 Greenl. 191; Nichols *v.* Chears, 4 Sneed, 229.

(*d*) Robertson *v.* Smith, 18 Johns. 459; Ward *v.* Johnson, 13 Mass. 148; Smith *v.* Black, 9 S. & R. 142; Moale *v.* Hollins, 11 Gill & Johns. 11; Will-

ever, been said, that the law as to dormant partners is confined to commercial partnerships, and does not extend to speculations in land. (*e*)

If such be the law in regard to one who is an actual but a secret partner, on the other hand, if he be not a partner in fact, but has, for or without a reason, suffered those who dealt with the firm, or any one of them, to believe that the firm had the guaranty of his liability as partner, and thus gave to the firm his credit, there are no grounds whatever for permitting him to refuse to satisfy that guaranty, merely because the actual relation between him and the partnership would not of itself have created it. (*f*) To give to such a circumstance

ings *v.* Consequa, 1 Pet. C. C. 301; Anderson *v.* Levan, 1 W. & S. 334. See further Pierce *v.* Kearney, 5 Hill (N. Y.), 94; Moss *v.* McCullough, id. 135, 136; Ward *v.* Motter, 2 Rob. (Va.) 559, 560; Nichols *v.* Anguera, 2 Mills, 290; Grafton *v.* The United States, 3 Story, 649; United States *v.* Cushman, 2 Sumn. 438; Gibbs *v.* Bryant, 1 Pick. 121; Peters *v.* Sandford, 1 Denio, 224; Van Valen *v.* Russell, 13 Barb. 593; Ledam *v.* Hodges, 4 McLean, 51; How *v.* Kane, 2 Chand. 222; Philson *v.* Bampfield, 1 Brevard, 202. Whether, if a creditor has lost his right of action against all the partners, by obtaining judgment against the ostensible partner alone, equity will relieve him as against the dormant partners when discovered, see Penny *v.* Morton, 4 Johns. Ch. 566; Willings *v.* Consequa, 1 Peters C. C. 301; Smith *v.* Black, 9 S. & R. 142; Ledam *v.* Hodges, 4 McLean, 51; How *v.* Kane, 2 Chand. 222.

(*e*) Pitts *v.* Waugh, 4 Mass. 424; Smith *v.* Jones, 3 Fairf. 332; Smith *v.* Burnham, 3 Sumn. 470. See *post*, ch. 11, § 3.

(*f*) Young *v.* Axtell, cited in Waugh *v.* Carver, 2 H. Bl. 235. There the question was, whether Mrs. Axtell was liable as partner with the defendant, for coals sold and delivered by the plaintiff. An agreement was in evidence, from which a partnership *inter se* was attempted to be proved; but, it being shown that bills were made out for goods sold to her customers in their joint names, Lord Mansfield said: "However, as she suffered her name to be used in the business, and held herself out as a partner, she was certainly liable, though the plaintiff did not, at the time of dealing, know that she was a partner, or that her name was used." The ground upon which persons held out as partners are made liable, as such, to third persons, is thus stated by Lord Chief Justice Eyre in Waugh *v.* Carver, *supra*: "Now, a case may be stated in which it is the clear sense of the parties to the contract that they shall not be partners; that A. is to contribute neither labor nor money; and, to go still further, not to receive any profits. But, if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or four persons, when, in fact, they lent it only to two of them, to whom, without the others, they would have lent nothing." See further, in illustration of the general principle, De Berkom *v.* Smith, 1 Esp. 29; Guidon *v.* Robson, 2 Camp. 302; Parsons *v.* Crosby, 5 Esp. 199; *Ex parte* Watson, 19 Ves. 461; *Ex parte* Matthews, 3 Ves. & B. 125; Dolman *v.* Orchard, 2 C. & P. 104; Stearns *v.* Haven, 14 Vt. 540; Cottrill *v.* Vanduzen, 22 id. 511; Furber *v.* Carter, 11 Humph. 271; Perry *v.* Randolph, 6 S.

this effect would be to sanction an obvious and easy fraud. It may, however, be said that he is liable as a partner only to those who have been led with his consent to believe him a partner, and who have trusted the firm on his credit. (*ff*)

* 66 * But when we go further, and seek to determine the exact facts and rules which decide whether a person is liable, either as actual partner or as ostensible partner, we find a considerable difficulty. These questions we now proceed to consider.

SECTION II.

WHEN A PERSON IS LIABLE AS ACTUAL PARTNER.

The cases on this subject are not easily reconciled, nor is the language used in relation to it always admissible, or indeed intelligible. All that we have said in the preceding chapter has some bearing upon the subject of this; for, if one certainly is a partner in relation to others who are copartners, he is so in relation to third persons dealing with the firm. It is true, as we have already intimated and shall hereafter state more fully, that partners may, by an agreement made among themselves, which is also made known to their customers,

* 67 importantly qualify the obligations of one * partner or another in reference to these customers. Still it is also true that the tests already exhibited, as those by which we may determine who is, as to the partnership itself, a member of it, will be useful when the question comes, Is he a member of it as to others?

Thus, we have already seen that a community of interest in the profits is essential to a partnership, and, generally at least, that such community will suffice to constitute a partnership. (*fff*) But it is certain that every interest in the profits is not sufficient to make a person a partner, or liable as a partner. In many recent cases it has been held that participation in the profits is not a decisive proof of partnership, unless the participation is such as to constitute the relation of principal and agent be-

& M. 335. See also *post*, ch. 6, § 5; Fisher *v.* Bowles, 20 Ill. 396; Irwin *v.* Conklin, 36 Barb. 64; Burns *v.* Rowlands, 40 id. 368; Moss *v.* Jerome, 10 Bosw. 220; Moffat *v.* Moffat, id. 468.

(*ff*) Wood *v.* Pennell, 15 Me. 52.

(*fff*) Duryea *v.* Burt, 28 Cal. 569; [*In re* W. W. Francis, 7 N. B. R. 359.] See Pratt *v.* Langdon, 12 Allen, 544, and 97 Mass. 97.

tween the person taking the profits and those actually carrying on the business. (*fff*) The very customers and creditors of a firm may be said to have some interest in the profits. They depend upon them as the fund for payment of their debts, and they are said to have, as we shall see, a kind of lien upon them for this purpose. To go nearer to the partnership, however, it is more obvious that the employés of the firm have an indirect interest in the profits, although no property in them; for to these they look for their salaries and wages. Out of this fund these are paid; and every payment of his annual salary to a clerk diminishes by just so much the funds which would go to the payment of the debts. Now, it is very frequently said, that the taking of the profits takes from the fund to which the creditors look for payment, and that this is the reason why the taker is held liable to the creditors. (*g*) But as every payment

(*fff*) Bullen *v.* Sharp, Law Rep. 1 C. P. 86; [*In re* Howard, 25 W. R. Ct. of App. 854; s. c. 4 L. & Eq. Rep. 523; Ross *v.* Parkyns, L. R. 20 Eq. 331. In Molwo *v.* Court of Wards, L. R. 4 P. C. 419. It should appear that the person taking the profits took them by virtue of his rights as a principal in a joint business, where each party had authority to bind the other. Harvey *v.* Childs, 28 Ohio, 319. The interest must be in the profits as profits, and not merely as compensation. Legett *v.* Hyde, 58 N. Y. 272; Shepard *v.* Pratt, 16 Kan. 209; Burton *v.* Goodspeed, 69 Ill. 237. A mere contingent interest in property, without right in the property of the firm, and without responsibility for losses, constitutes no partnership. Com. *v.* Bennett, 118 Mass. 443; Haskins *v.* Warren, 115 id. 514; Campbell *v.* Dent, 54 Mo. 325; Eastman *v.* Clarke, 53 N. H. 276; Bendell *v.* Hettrick, 45 How. (N. Y.) Pr. 198; Crawford *v.* Austin, 34 Md. 49; Morgan *v.* Stearns, 41 Vt. 397; Chapline *v.* Conant, 3 W. Va. 507; Parker *v.* Fergus, 43 Ill. 437; Smith *v.* Vanderberg, 46 Ill. 34; Mason *v.* Hackett, 4 Nev. 420; Hargrave *v.* Conroy, 4 Green (N. J.), 281. In Manhattan, &c. *v.* Sears, 45 N. Y. 797, it is said that participation in the profits makes one a partner as to third parties. But the point was not in the case as the facts showed participation in both profits and losses. See also *post*, p. *74. Under the statute in Massachusetts giving jurisdiction in equity of suits upon account not conveniently adjustable at common law, a person, not a partner, who has a portion of the net profits for his compensation, may maintain a bill in equity as if he were a partner. Hallet *v.* Comston, 110 Mass. 32. One who is entitled to a percentage of profits as compensation, though not a partner, may have an account. The right to an account is not a conclusive test of partnership. Bentley *v.* Harris, 10 R. I. 434, distinguishing Hazzard *v.* Hazzard, 1 Story U. S. C. Ct. 371. For cases of partnership resting on special contracts and near the line of agency paid by a share of the profits, see Rider *v.* Wilcox, 109 Mass. 24; Remington *v.* Allen, 109 Mass. 47. See also, upon the general subject, *post*, p. *71, note (*l*).]

(*g*) De Grey, C. J., seems first to have stated this proposition in Grace *v.* Smith, 2 W. Bl. 998. The language he there makes use of, and which has since been quoted with approbation in innumerable cases, is: "Every man who has a share of the profits of a trade ought also to bear his share in the loss. And, if any one takes part of the profits, he takes part of that fund on which the creditor of the trader relies for his payment."

from the funds has precisely this effect, and every payee certainly does not become liable for the debts of the firm, it is obvious that this reason is not of itself, and expressed in these general terms, a sufficient one.

Lord Eldon said (*h*): "The cases have gone to this nicety, upon a distinction so thin that I cannot state it as established upon due consideration, that, if a trader agrees to pay another person, for his labor in the concern, a sum of money, even in proportion to the profits, equal to a certain share, that will not make him a partner; but if he has a specific interest in the profits themselves, as profits, he is a partner." Afterwards, in *the same case, as if in explanation, and certainly in confirmation, of this, he says: "It is clearly settled, though I regret it, that if a man stipulates that, as the reward of his labor, he shall have, not a specific interest in the business, but a given sum of money, even in proportion to a given *quantum* of the profits, that will not make him a partner; but if he agrees for a part of the profits as such, giving him a right to an account, though having no property in the capital, he is, as to third persons, a partner." In another case, (*i*) he says, more briefly, but evidently intending to express the same rule: "The ground is settled, that, if a man, as a reward for his labor, chooses to stipulate for an interest in the profits of a business, instead of a certain sum proportioned to those profits, he is, as to third persons, a partner." The inference from this, and perhaps a justifiable inference, has been, that if a clerk, for example, agrees to take one-twentieth part of the profits of a firm, he becomes liable as a partner; but, if he agrees to take a sum of money equal to one-twentieth part of the profits, he is not a partner: but we cannot admit that this is a strictly necessary inference from Lord Eldon's statements, or a reasonable or a useful rule.

*68

It cannot be denied that this declaration, so understood, has had great influence upon the courts and the profession. Collyer says, "It must be admitted that his lordship's *dicta* upon this subject have received the sanction of the most eminent practitioners at the bar." (*j*) In this country they have been at

(*h*) *Ex parte* Hamper, 17 Ves. 404.

(*i*) *Ex parte* Rowlandson, 1 Rose, 91.

(*j*) Collyer on Partnership (Perkins's ed.), § 40. See the form and terms of the agreement before the court in Stocker *v.* Brockelbank, 3 Mac. & G. 250, 5 Eng. L. & Eq. 67.

least as generally adopted. We have reason to believe that, for many years, in various parts of this country, numerous contracts of this kind have been drawn, carefully using the language which Eldon is supposed to have made *safe*, by the distinction he asserted. Nor is it difficult to account for this. For, to say nothing of the immense authority of so eminent a judge, his words so understood supply a clear, simple, and easily applicable rule for the avoidance of a great danger. They tell the lawyer who would draw a contract of this kind, how, by a mere formula, he can guard his clients from a great uncertainty; the inconvenience of which might otherwise suffice to prevent the proposed arrangement. As * a * 69 convenient rule, much may be said of it; but, as an accurate one, it must be spoken of very differently.

It is indeed very remarkable, that a rule, or a distinction, to which Lord Eldon strongly objects, not merely "doubting," but positively affirming his dislike, and which he lays down, as he says, under the constraint of irresistible authority, should since have been generally adopted, not so much on his authority, as on his assertion of preceding authority, when in point of fact no such authority can be found, or, so far as any accessible evidence goes, can now be believed to have existed. The only case in the books, to which he can be supposed to refer, (*k*) on the one hand, would not justify a specific rule of this kind, and, on the other, does not seem to contain any thing calling for animadversion or regret.

We cannot but think that Lord Eldon has been misunderstood, and perhaps misreported. If the first of the three paragraphs above quoted stood alone, it would not conflict with the current of authority existing at that time, nor with the general and best-established principles of the law of partnership; but neither would it express or justify the rule drawn from it. If one promises to pay another a sum of money equal to one-twentieth of the profits, "that will not," says Lord Eldon, "make him a partner." Certainly it will not: it will raise a presumption that he is not a partner, which can be rebutted only by showing, from other parts of the contract or by other means, that he is a partner. "But if he has a specific interest in the profits themselves, as profits, he is a

(*k*) Grace *v.* Smith, 2 Wm. Bl. 998.

partner." Undoubtedly he is: every principle of the law of partnership leads to this conclusion. *But, if the trader agrees to pay to him one-twentieth part of the profits, this does not necessarily give him a specific interest in the profits themselves, as profits.* And in the supposition that it has this effect, lies, we think, the mistake. So, in the third of the passages above quoted, it is said: "If a man chooses to stipulate for an interest in the profits of a business, he is as to third persons a partner." Undoubtedly, again; but a stipulation that he shall have a definite aliquot part of the profits, for his services, is not a stipulation "for an interest in the profits of a business." If the word "interest" be used here in the broad sense
* 70 necessary to make it true that such a * bargain gives an interest in the profits, then such an interest is not sufficient to make a man a partner; and, if it be used in the restricted and technical sense in which one who has an interest in the profits is accurately said to be made thereby a partner, then it is not true that a bargain for a definite part of the profits gives the receiver "an interest in the profits, as such." We doubt whether either of these two passages, or the two together, would have given rise to this construction, or to this rule. The trouble lies with the other passage which we have quoted. Here, Lord Eldon uses a different phrase from that which he employs in the other two. He says, "But if he agrees for a part of the profits, he is a partner." He certainly seems to use this phrase as the exact equivalent of the other; that is, he appears to think that a bargain for a definite part of the profits for services or any other consideration, and a bargain to become interested in the profits, are one and the same thing. Here, we say, is the mistake; nor should we have much doubt that it was a mistake made *for* Lord Eldon, and not *by* him, were it not for the regret he expresses. Such a view leads to a conclusion, to a distinction, to a rule, which might well be regretted, because they have no truth and no foundation. But if he only meant to say, what we should otherwise incline to suppose that he meant (even at the necessity of believing him misreported as to a few words), then we do not see any thing to cause either his surprise or regret.

What we mean is this: The principles of the law of partner-

ship lead decidedly to the conclusion, that if a trader makes an arrangement in regard to a commercial business or transaction with another person, by reason whereof that other person becomes interested as the first is interested (no matter in what proportions) in the resulting profits, while they are undivided and remain as profits, these two are certainly partners. And the same principles lead us directly to this other conclusion, that a mere payment, or promise to pay out of the profits, a sum of money, as a specific proportion of the profits, does not necessarily constitute the payee a partner, and gives him no interest *in* the profits, and no right *to* the profits, but only a personal claim against the promisor for such money, or for such a share of profits after they are ascertained and may be divided. Undoubtedly there may be connected with the promise other terms, promises, or conditions, which * clothe the * 71 promises with the interest and character of a partner; but the promise does not. If two men were bargaining for a house, and the seller says, Your business is so prosperous, you can afford to pay me all I ask; and the buyer replies, You mistake: the profits of my business are not so large as you think; and the seller rejoins, Well, I will, at all events, take one-fourth part of your next year's profits for the house; and a written contract is executed on these terms, — it would be simply absurd to contend that this sale of a house made the seller liable for all the business debts of the buyer. Our conclusion is, that the question of interest in the profits, *as such* (by which we mean the profits before they are ascertained and divided), is always to be inquired into. The words which the parties use, and all of them, and all the parts and provisions of their agreement, as well as its general character and their relation to each other, are to be looked at; and if the whole evidence leads to the conclusion that the receiver of money took it in good faith only as wages or specific compensation or payment, and did not intend to acquire any interest in or any control over the business, or in the profits as they accrue and before they are ascertained and divided, but only after they were ascertained to find in them the fund and in their amount the measure of his payment, he is no partner, nor liable as such. (*kk*) And the true test is,

(*kk*) Bidwell *v.* Madison, 10 Minn. 13; Hargrave *v.* Conroy, 4 Green, 281.

Did the supposed partner acquire, by his bargain, any property in or any control over the profits, while they remained undivided? If so, he is liable to third persons; and otherwise, not. This subject is certainly one of the most interesting, and perhaps one of the most difficult, in the whole law of partnership. And we have given to it, in our notes, the space necessary for a full analysis and comparison of the leading cases. (*l*)

(*l*) The rule laid down in the text for determining who are partners as to each other, because actual partners, is not perhaps fully stated and applied in any one case. But we consider it the only clear and intelligible result deducible from all the authorities. The cases on this difficult point are naturally divisible into three classes: those in which a party puts into a business his labor, those in which he puts in his property, and those in which he puts in both property and labor. But, as the same principle governs in all, this arrangement is of no particular service. The instances in which money is loaned for a share in the profits, involve the question of usury, and will be separately considered hereafter. We shall examine the leading authorities with reference to two points: first, to see whether they really establish and sanction the principle that a taking of a share in the profits of a trade does of itself make one a partner as to third persons; and, if it does not, second, to see whether the true test of partnership, as to third persons as well as *inter se*, is not an ownership of the profits before they are divided. In Waugh *v.* Carver, 2 H. Bl. 235, the question was, whether the defendants, the two Carvers and Giesler, were liable as partners upon the true construction of certain articles of agreement. The material portions of their contract were these: The two Carvers, merchants and ship agents, residing in Gosport, agreed with Giesler, also a merchant and ship agent, that, for their mutual benefit, he should establish himself at Cowes, and there carry on a house in the agency line. The two Carvers were to recommend ships to Giesler, and were to receive a share in his commissions on such ships, and in the discount of the bills of the tradesmen employed on them. Giesler was to act by the advice of the Carvers, to recommend ships to them, and to receive a share in their commissions on them, and in their discounts on tradesmen's bills, and also certain proportions of warehouse rent and agency. Liberty was given to the Carvers to occupy warehouses at Cowes, without Giesler's interference, and the parties were to form no conflicting business connections. It was then covenanted that one-fifth part of the agency or commission on each ship should be retained by the party under whose care such ship should be, as compensation for all incidental expenses, the remaining balance of the commissions to be divided in the above-mentioned proportions; and that such commissions or agency should be ascertained by each party's producing to the other annual authenticated accounts. Lastly, it was stipulated that each party should separately run the risk of and sustain all such losses as might happen on the advances of money by either in respect of any ships or vessels; and that neither party should be affected by any losses, or be answerable for any acts, deeds, or receipts of the other of them, but that each should be answerable for his own. The parties having acted upon this agreement, we may observe that there was a clear case of actual partnership: 1. There was a common stock or joint capital, contributed by each of the parties, and consisting of the use of the money and other property furnished by each of the parties to carry on the business at Gosport

Before leaving the question of the effect of sharing the profits, it should be stated that there are many ways in which persons

and Cowes respectively. 2. There was a participation in and ownership of the profits while they remained profits. One-fifth was to be deducted from the gross commissions as they accrued, to defray current expenses, and become at once the separate property of the parties. The balance remained in their hands as a common fund, to be divided among them, and become their individual property upon a settlement of accounts. As to the stipulation that each party should bear his own losses, &c., we have already seen that it is not inconsistent with a partnership for one partner to covenant that he shall not be liable either to any loss, or, as in this case, to particular items of loss; for here the gross proceeds alone of the business were not to be divided, but those proceeds diminished by an allowance to each party for his expenses in carrying it on. 3. Other provisions in the articles give the whole agreement the tone and character of a contract of partnership; as the provision giving the Carvers leave to engage warehouses at Cowes, and those by which the parties mutually agree to account, and not to form other business connections. All these provisions seem to be consistent only with an actual partnership; and therefore the decision of the court, that the parties were liable as partners, seems unobjectionable. But of the grounds upon which that decision is professedly put, the same cannot be said. The court (by Eyre, C. J.) first declare the question as to whether the parties are partners as to each other not to be before them; but then say that they are not partners *inter se*, principally on the ground that they were not to share in losses, — an expression of opinion, in the view of the case taken by the court, clearly *obiter*, and, as we have just seen, not supported by the reason given for it. The Lord Chief Justice then proceeds to say that the parties evidently entitled themselves to share indefinitely in the profits of the business as they should arise; and that, upon the authority of Grace *v.* Smith, he who shares in the profits indefinitely, shall, by operation of law, be made liable to losses, upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts; and that, therefore, the Carvers and Giesler, though not partners *inter se*, had yet made themselves such with respect to third persons. The case is thus professedly decided upon the authority of a rule said by Lord Chief Justice Eyre to be the foundation of the decision in Grace *v.* Smith, and to stand upon the fair ground of reason. To estimate, then, the weight to be given to the principle of the decision of the court in Waugh *v.* Carver, we must see how far that principle is sanctioned by the case of Grace *v.* Smith, 2 W. Bl. 998. There Smith & Robinson dissolved partnership. But, Robinson continuing the business, Smith left behind in the trade 4,000*l.*, for which he was to receive five per cent. interest, and an annuity of 300*l.* a year. The question being whether Smith & Robinson were general partners, De Grey, C. J., said: "Every man who has a share of the profits of a trade ought also to bear his share of the loss. And if any one takes part of the profits, he takes part of that fund on which the creditor of the trader relies for his payment. . . . I think the true criterion is to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund of payment. . . ." Now (whatever may be the effect of Mr. Justice Blackstone's opinion, which we shall consider when we come to loans), there is nothing in the extracts above quoted which makes any distinction between sharing *definitely* and sharing *indefinitely* in profits. On the other

may join in an enterprise or transaction, and share the profits, without becoming partners; as where an owner of land fur-

hand, the distinction is between sharing the profits of a trade and relying on them for payment, in both of which cases the indefiniteness may be the same. In the second place, the ground of this distinction cannot be that every man who participates in profits should be liable to losses because he takes from that fund on which creditors rely; since, whether he shares in profits, or relies on them for payment, he equally takes from that fund. Indeed, the remarks of this nature with which Chief Justice De Grey commences his opinion seem to be merely general ones, founded on supposed equitable considerations, but neither universally true, nor serving nor intended to serve as the grounds of the rule he afterwards lays down. Hence we think that neither the rule asserted in Waugh *v.* Carver as deducible from Grace *v.* Smith, that he who takes a share of the profits *indefinitely* shall be liable as partner for losses, nor the reason given for it upon the same authority, because by so doing he takes from the fund on which creditors rely for payment, is established in that case. The criterion laid down by Chief Justice De Grey is, it is true, vague and indefinite. But there is a view of it which is not only obvious and natural, but which also makes it entirely consistent with what we consider true principles. The distinction drawn is between Smith's sharing the profits *with* Robinson and his merely relying on them as a fund of payment. Now, if by *sharing* the profits *with* Robinson is meant being interested in them as Robinson was, and in the same right, then the sort of interest which it is said Smith would have, if he were a partner, is that of joint *owner* of the profits *with* Robinson. And the sort of interest the criterion of De Grey gives Smith, if he were not a partner, is not expressed by the words sharing in the profits in any way. But in that case he is said to simply rely on them as a fund out of which, indeed, he has a right to be paid, but in which he does not *share*. But whatever may be the true meaning of Chief Justice De Grey's criterion, in any interpretation we think it opposed to the broad rule which is derived from it by the court in Waugh *v.* Carver.

The next case we propose considering is that of Hesketh *v.* Blanchard, 4 East, 144. There, Robertson, the defendant's testator, having neither money nor credit, requested the plaintiff to order goods with him to be taken on a voyage, and promised, that, if any profit should arise from them, the plaintiff should have one-half for his trouble. The plaintiff did as requested, and, having subsequently paid the whole price of the goods, brought the present suit against Robertson's executor to recover the amount so paid. It was *held*, that the action would lie. Lord Ellenborough said: "The distinction taken in Waugh *v.* Carver *et al.* applies to this case. *Quoad* third persons, it was a partnership; for the plaintiff was to share half the profits. But as between themselves it was only an agreement for so much, as a compensation for the plaintiff's trouble, and for lending Robertson *his* credit." Now, the only question before the court being whether the parties were partners as to each other, the decision that they were not was called for, and seems consonant with the facts of the case and with true principles. They clearly did not intend to form a partnership; and the whole proceeds of the adventure before division clearly belonged to Robertson. But the additional remark that *quoad* third persons they were partners is purely *obiter*, and may be classed with the *dicta* of Waugh *v.* Carver, but can have no more weight.

We may now examine the cases in which the rule referred to in the text is laid down by Lord Eldon. The facts upon which the question of partner-

nishes seeds and implements to one who is to work the land and divide the profits with him; or where one lets a farm or

ship turned were the same in *Ex parte* Rowlandson, 1 Rose, 91, and in *Ex parte* Hamper, 17 Ves. 403. Thomas & Rogers had been partners in a mercantile adventure to Cadiz, Rogers furnishing goods, and Thomas going out with and selling them. Before the goods were all sold, Rogers entered into a new arrangement with Thomas, as follows: "I do agree to give Thomas one-half the profits he makes on my goods, instead of a commission, after shipping, freight, and every expense paid; I pay Thomas his passage out." This agreement was acted upon by the parties, and letters were in evidence from Thomas to Rogers, in which Thomas styled himself a partner, and other expressions indicating the existence of a partnership between Rogers and himself. In 1 Rose, 91, Lord Eldon said: "The ground was settled that if a man as the reward for his labor chooses to stipulate for an interest in the profits of a business, instead of a sum proportioned to those profits, he is as to third persons a partner." In 17 Ves. 403, he said: "If a trader agrees to pay another person for his labor in the concern a sum of money even in proportion to the profits, equal to a certain share, that will not make him a partner; but if he has a specific interest in the profits themselves, as profits, he is a partner." And again: "It is clearly settled that if a man stipulates that, as the reward of his labor, he shall have, not a specific interest in the business, but a given sum of money, even in proportion to a given *quantum* of the profits, that will not make him a partner; but if he agrees for a part of the profits, as such, giving him a right to an account, though having no property in the capital, he is as to third persons a partner. Upon the memorandum, therefore, *and the letters* in this case, there is no doubt that Thomas would be liable." These three propositions of Lord Eldon, applied to the same state of facts and in the same way, are clearly only different expressions of the same rule, and are to be explained by reference to one another, and to be understood as meaning the same thing.

The first thing to be observed is that the criterion of Lord Eldon gives no support to the rule asserted in Waugh *v.* Carver, that he who participates in the profits of a trade *indefinitely* is liable as a partner, *because* he takes from the fund on which creditors rely; since, whether a man has one-half of the profits of a trade, or a sum equal to one-half, in both cases he is alike affected by the accidents of trade, and in both cases takes from the fund to which creditors look for payment. But, as in Grace *v.* Smith, the distinction taken is between different kinds of *interests in or claims upon* profits. Thus, if a man agree as the reward of his labor for a sum equal to half the profits of a trade, that kind of interest in profits, it is said, will not make him a partner. Yet his remuneration depends upon the accidents of trade; he diminishes the fund on which creditors rely, and he is entitled to an account; for though Lord Eldon, in one passage we have quoted, speaks of the right to an account as belonging to that species of interest which will make a man a partner, yet he cannot be understood to mean that it is exclusively characteristic of that interest. But this sort of interest in profits will not make a man a partner. On the other hand, "a specific interest in the profits themselves, as profits," "an agreement for a part of the profits *as such*," is declared to be that sort of interest which will make a man a partner. Now, by the terms "profits themselves, as profits," and "profits as such," used in relation to a partnership and to partners, must, we think, be meant profits before division. For, when the profits made by a firm have been divided among its individual members, there remains no fund which

inn for a portion of the profits; or where seamen sail a ship on shares. All such cases are governed by the general principle,

represents the profits of the partnership business. The aliquot portions of the profits which the several partners have received represent the returns of their *several* investments of capital or labor. But the only fund which can represent the profits of the business of the partnership is those profits while they remain undivided and part of the stock in trade. And this is what we understand by the expressions of Lord Eldon, "profits themselves as profits," and "profits as such." And the interest in profits so understood, which will make a man a partner, must be a "specific interest." It must be greater and more immediate than that of one whose return for his property or labor depends wholly upon the amount of profits. It must be greater than that of a person who is simply entitled to an account. We think it can be interpreted to be no other than a proprietary interest, an ownership in the undivided profits. And, if this be the meaning of the term, then Lord Eldon's criterion is entirely consistent with that of Chief Justice De Grey, of which it professes to be only a differently worded statement. Moreover, so understood, it is perfectly intelligible, and recognizes what we believe to be the true test of partnership. It seems open only to the objection mentioned in the text; that it appears to hold that, if a man stipulates for a half or a fourth of the profits of a business, he thereby necessarily acquires that specific interest in the profits, as profits, which we think to mean an ownership of the undivided profits. But in this very case of *Ex parte* Hamper, Lord Eldon decides that Thomas is a partner, not merely upon the ground that by the memorandum he was to have half the net profits; but, as if that circumstance alone were not sufficient, he says: "Upon the memorandum *and the letters in this case*, Thomas would undoubtedly be liable." These letters contained, as we have seen, admissions by Thomas that he was a partner, and were therefore important as showing in what right Thomas was to have one-half the profits.

We think these views are sustained by another case decided by the same judge, *Ex parte* Langdale, 18 Ves. 300. Here, the bankrupt kept a canteen. The question was whether the brewers who supplied him with beer were liable as his partners in respect of their participation in profits under their agreement. This agreement, according to the brewers' account, was that the brewers were to pay half his rent, and supply him with beer at 4*l.* 5*s.* per barrel, the usual price being 3*l.* 8*s.* The bankrupt's account was that the brewers were to have out of the profits 17*s.* per barrel for the half of the rent; the bankrupt taking the rest. Now, by either account, the brewers were directly interested in the profits of the bankrupt's business. But, if the brewers' account were the true one, then there was no undivided fund of profits in which both the bankrupt and the brewers were interested. On the contrary, when profits accrued, they were always already divided, and they could accrue in no other shape. If, however, the bankrupt's account was the true one, there was an undivided fund of profits in which both the brewers and himself were interested. These being the facts of the case, Lord Eldon said: "The true criterion is whether they are to participate in profit. That has been the question ever since the case of Grace *v.* Smith." Now, if the phrase "participation in profit" is interpreted in a general sense, then the brewers were partners, whichever was the true account of their contract. But Lord Eldon proceeds: "I cannot refuse to let this case go to a jury. The agreement to sell their beer to him at a higher price than to others would not make them partners; but the bank-

that they only are partners who are jointly interested in the profits, as profits, and not by way of payment for labor or services performed. (*ll*)

rupt's representation is so different, that it is impossible to determine, without the decision of the jury upon the question, whether this was an agreement for a division of the profits, or the brewers stood only in the relation of vendors of the beer to this retailer at 4*l.* 5*s.* per barrel, in consideration of paying half his rent, selling to others at 3*l.* 8*s.* If the actual contract gave a claim upon the profits, or the application of them, that is partnership. If there was no claim upon the profits, or the application of the profits, then it is not partnership." The whole case, taken in connection with the authority cited, and the cases decided by the same judge which we have just examined, is not in conflict with the doctrine of the text. The same may be said of the case of *Ex parte* Watson, 19 Ves. 459. There Lord Eldon said: "There is a wide difference betwixt a dormant and a nominal partner. The former is liable in respect of the profits; but one who receives a salary not charged upon profits, according to a known but nice distinction, is not by that a partner." We consider this as simply a looser expression of the rule laid down in *Ex parte* Hamper, and *Ex parte* Rowlandson, and as one to be explained by reference to those cases, especially since in the case before the court its application was not called for. See *Ex parte* Hodgkinson, 19 Ves. 291; *In re* Colbeck, Buck, 48. See also, in this connection, *Ex parte* Digby, 1 Deac. 341, a case in which the only thing justifying the decision of the court seems to be the declarations of the party sought to be charged as partner. Tench *v.* Roberts, 6 Madd. 145; Withington *v.* Herring, 3 Moo. & Payne, 30. —— The case of Cheap *v.* Cramond, 4 B. & Ald. 663, contains a *dictum* approving of the doctrine of Waugh *v.* Carver. But we have already treated of that case in an earlier note, when considering another principle to which it is clearly referable. In Dry *v.* Boswell, 1 Camp. 329, the decision of the court seems to have been founded on the same principle. But we shall consider that case, when we examine the distinction between gross and net profits at the close of this section. So it is generally held that sailors, who receive in lieu of wages a certain share of the profits of a voyage, are not thereby made partners with the other participators in the profits. Wilkinson *v.* Frazier, 4 Esp. 182; Perrot *v.* Bryant, 2 Y. & Coll. 61, explaining Coppard *v.* Page, Forrest, 1. In Mair *v.* Glennie, 4 M. & S. 240, it was contended that the captain of a vessel, who was to share, in lieu of wages, one-fifth in the profit or loss of the voyage on ship and cargo, was a partner with the owners. Lord Ellenborough said: "According to that mode of argument, every seaman in a Greenland voyage would become a partner in the fishing concern. There is no pretence, therefore, for saying that the captain was a partner because his wages were to be regulated and paid by reference to a calculation on the profits of the adventure." The principle upon which the courts have proceeded in these cases is manifest. Mariners, under such agreements, share indefinitely in profits. They take from the fund on which creditors rely. They do not stipulate for a sum equal to a certain proportion of the profits. Yet, from the relative position of the parties, from the custom of

(*ll*) See an instructive case on this subject, Parker *v.* Fergus, 43 Ill. 438. Compare this case with Snell *v.* Deland, ibid. 323, and Wright *v.* Davidson, 13 Minn. 449. See *post*, p. *144, note (*k*).

* 72 * As to the intentions of the parties, Story, in his work on Partnership, intimates an opinion, that the rule would

the trade, in fine from the whole character of the transaction, it clearly appears that the sailors are not owners of the profits, *as such*, but merely interested in them as supplying the fund, or measuring the amount of their wages. This is well illustrated by the case of The Frederic, 5 Rob. Adm. 8. There the master claimed specific shares of the cargo, *as the property* of himself, and the officers and crew of his vessel. Sir Wm. Scott said: "I have no hesitation in pronouncing that these persons cannot be admitted to claim. They are to be considered as mariners; and their proportion of the proceeds of the voyage, as their wages." See opinion of Martin, B., in Hickman *v.* Cox, *supra*. So in Hartley's case, Rus. & R. 139. The same view may be taken of the instances in which a factor or broker has been declared not to be a partner. One who is a factor or broker is well known to be merely a peculiar kind of agent; and though he be paid by a proportion of the profits, still, if he act only as factor or broker, his holding that character shows his interest in the profits to be simply that of one who relies on them for payment, and not that of one who is interested in them, like his principal, as an owner. Thus, in Benjamin *v.* Porteous, 2 H. Bl. 590, the action was for goods bargained and sold, to recover the price of a quantity of indigo. The broker, who had sold the goods, being called to prove the contract, testified that by his agreement with the plaintiff he was to have for his own profit whatever he could get for the indigo above half a crown for the pound, but not an allowance of so much per cent by way of commission, in the usual manner. Eyre, C. J., thought the witness was not a broker nor factor, and that he was not competent on the score of interest. But the other judges said that they could not distinguish him from a common broker, except that he was paid for his trouble in a particular manner, namely, by a share in the profits, which could make no difference. They therefore held him admissible. So in Dixon *v.* Cooper, 3 Wils. 40, where a special action on the case was brought for the non-performance of a contract to receive and pay for three hundred quarters of wheat. The only witness offered to prove the contract was Morley, the plaintiff's factor, who made the contract with the defendant, and was to receive one shilling on the pound for selling the wheat. Objection being made to his competency, it was *held*, that he was a mere factor, a go-between, and was a good witness for either the vendor or vendee. Gibbons *v.* Wilcox, 2 Stark. 43.

There are several other recent English cases, which may be properly considered in this place. In Pott *v.* Eyton, 3 C. B. 32, Eyton, being concerned in a colliery, entered into an agreement with Jones for opening a store at Mostyn Quay, principally with the view of supplying his workmen with goods. Eyton built the shop. His name was put over the door, and appeared in the excise licenses, and in the invoices for goods bought for the store. Jones managed the shop, and paid over to Eyton the money taken there; of which Eyton received 7*l.* per cent on all sales to his workmen, and Jones all the rest of the profits. In 1834, Eyton & Jones entered into a new arrangement. Jones was thenceforth to buy goods in his own name, and to receive all payments. Eyton was to have 5*l.* per cent on the amount of sales to his workmen, and his name remained over the door. Jones had several other shops, and when he began to buy goods in his own name, opened an account with a bank at Halywell. In 1839, this bank failed, a large balance being due to it on that account; to recover which the present suit was brought against Eyton & Jones as partners. There

have been more * convenient, and more conformable to * 73
true principles as well as to public policy, if it had held

was no evidence that credit had been given to Eyton, or that the bankers supposed him to be a partner, or that they knew his name had ever appeared over the shopdoor, or in the licenses, &c. Upon these facts, it was left to the jury to say whether there had been a sharing of profit and loss between Eyton & Jones after the account was opened with the bank, so as to constitute an actual partnership between them. The jury found in the negative. A rule *nisi* being obtained on the ground that the verdict was against evidence, Tindal, C. J., said: "Traders become partners between themselves by a mutual participation in profit and loss: but, as to third persons, they are partners if they share the profits of a concern; for he who receives a share of the profits receives a part of that fund on which the creditors of the concern have a right to rely for payment, and is therefore to be made liable to losses, although he may have expressly stipulated for exemption from them. Grace *v.* Smith; Waugh *v.* Carver. But in the former of these cases, Lord Chief Justice De Grey, after laying down the rule of law in the terms which I have mentioned, proceeds: "If any one advances money to a trader, it is lent on his general personal security. It is no specific lien upon the profits of the trade; and yet the lender is generally interested in those profits: he relies on them for payment." Afterwards, he says: "I think the true criterion is to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund of payment, — a distinction not more nice than usually occurs in questions of trade and usury. The jury have said that this is not payable out of the profits." "So, in the present case, the jury have said there was no agreement to share the profits." "And it appears to us that in the present case the payment to Eyton was in the nature of commission on certain sales supposed to be effected through his influence over his workmen, and was not sufficient to render him, as a matter of legal inference, liable as a partner; and, in so far as it was a question of fact, it was disposed of by the jury." The grounds of the decision of the court, as appearing in the above extracts, are not perhaps entirely manifest. If the verdict of the jury, that there was no participation in profit, was supported by the evidence, as appears to be assumed in the first of the above quotations, then there was no occasion to affirm the doctrine of Waugh *v.* Carver. But we think the true reason why the case was so decided is found in the last quotation, namely, that it appeared from the whole character of the relations between the parties that Eyton's interest was simply of the nature of a commission on certain sales. Indeed, we think the facts in the case clearly indicate that, under the second agreement, Eyton was no longer an owner of the profits; as, for instance, the fact that Jones was to take the avails of the sales of the shop, whereas, under the first agreement, Eyton was to receive them.

In Barry *v.* Nesham, 3 C. B. 641, Nesham, the proprietor of a newspaper, sold out the concern to Lowthin for 1,500*l.*; payable, with interest, by instalments running through a period of several years. Nesham also guaranteed to Lowthin a clear annual profit of 150*l.* over and above the payment of the annual instalments and the interest thereon; in consideration whereof, Lowthin agreed to pay to Nesham all the profits over 150*l.* per annum, until such surplus profits should amount to 500*l.*; and, if they should amount to so much during the seven years, then Lowthin agreed to pay, in addition to the purchase-money, interest, and the 500*l.*, the existing liabilities of the newspaper not exceeding 250*l.* It was also agreed that Nesham should

* 74 that no partnership should be deemed * to exist at all, even as to third persons, unless such were the intention

receive such surplus profits only till the same amounted to 500*l.*; that Lowthin might pay off the purchase-money, and assume all the liabilities, and become entitled to all the profits of the newspaper at any time; and that Nesham might, upon giving six months' notice, withdraw the above-mentioned guaranty. The question was, whether Nesham was liable as partner for goods supplied to the newspaper at Lowthin's order. The court reiterate the general doctrine of Waugh *v.* Carver. But we do not think they really apply it. The counsel for the defendant contended that the court must look at the whole purview of the agreement, in order to ascertain the intention of the parties. Wilde, C. J., said: "Adopting the principle of that case, and looking at *the intention* of the parties to their agreement, I am unable to come to any other conclusion than that it created an interest in the profits of the concern in Nesham, which constituted him a partner *quoad* third persons. The view presented by my brother Maule, in the course of the argument, seems to me to be the correct one." Maule, J., said in the course of the argument: "The proper way of taking the account between the parties under the agreement, as it strikes me, should be, to treat Nesham as a person entitled to the whole profits of the newspaper, subject to the payments guaranteed to Lowthin;" and in his judgment "I quite agree, that we are to look at the substance, and not at the mere form, of the transaction. The question is, whether it gave Nesham an interest in the profits of the newspaper." And he determines what the interest of Nesham is in the following manner: "Before the date of the agreement, the whole profits belonged to him. What does he, in substance, part with? Lowthin is to manage the concern, and to receive 150*l.* a year, at all events, for seven years. That is all that Lowthin is certain of receiving. Deduct that sum from the whole interest in the newspaper, and Nesham is interested in the excess, except in the improbable event of the profits realizing more than sufficient to pay the annual instalments of the 1,500*l.*, the 150*l.* a year to Lowthin, and the further sum of 500*l.* in the seven years. Upon that simple statement, it might very well be questioned whether Lowthin was a partner, or whether he was not a sort of salaried agent, remotely interested in surplus profits. It is however, unnecessary to discuss that; for no one disputes that *he* is a partner. I think Nesham is a much more unquestionable partner than Lowthin." Now, it is evident that the interest in the profits which Maule, J., here gives to Nesham is none other than that of owner. He considers him as never having wholly parted with his proprietary interest. See further Heyhoe *v.* Burge, 9 C. B. 431. The head-note is as follows: A. & B., by a memorandum in writing, agreed, "for services performed," to allow C. a fourth share of *the clear profits* arising from a contract for the construction of a line of railway; and there was evidence to show that C. had acted upon the agreement (though not formally a party to it), and that he had to some extent interfered in the work. *Held*, sufficient to show that C. was a partner in the transaction, *quoad* third persons. See also the recent and very interesting case of Hickman *v.* Cox, 3 C. B. N. S. 523, and 36 Eng. L. & Eq. 400. [Grace *v.* Smith, and Waugh *v.* Carver may be said not to be now law in England. Cox *v.* Hickman, 8 H. of L. Cas. 268; Buller *v.* Sharp, L. R. 1 C. P. 86; Stat. 28; 29 Vict. ch. 86; *post*, p. * 93, note (*t*); *ante*, p. * 67, note. See further, as to *criteria* of partnership, Am. Law Reg. N.S. 10, p. 209; Molwo *v.* Court of Wards, L. R. 4 P. C. 429. See also Lord *v.* Proctor, 7 Phila. (Penn.) 630; Kaiser *v.* Wilhelm, *post*, p. * 524, n. (*k*).]

The American authorities on this subject are in no inconsiderable con-

of the parties, or unless they had so held themselves out
*to the public. He admits, however, that the common *75

flict. Mr. Justice Story believes that the true principle, and the one deducible from all the authorities, is, that a participation in profits raises a presumption of partnership, which, however, is not conclusive, but may be overcome by other circumstances. Story on Part. § 38, et seq. Chancellor Kent affirms the general doctrine of Waugh *v.* Carver, and also adopts the principle that the interest in profits which will constitute a man a partner must be such as to entitle him to an account. 3 Kent Com. (8th ed.) pp. 22, 23, 26, 32. And the same distinction is approved by Chancellor Walworth in Champion *v.* Bostwick, 18 Wend. 184, 185 [reaffirmed by the Court of Appeal in Manhattan Brass Co. *v.* Sears, 45 N. Y. 797; Leggett *v.* Hyde, 58 N. Y. 272, which last especially expressly affirms the doctrine of Grace *v.* Smith, and Waugh *v.* Carver]. Still the tendency of the cases, especially of the later and better-considered ones, we believe to be on the whole in favor of the doctrine of the text. We shall examine particularly only those which are important, either from the elaborate consideration they have received, or because they may be regarded as representing a class. There are quite a number of early cases in which the courts have applied without a question the rule asserted in Waugh *v.* Carver, and supposed to be confirmed by Lord Eldon. Thus, in Purviance *v.* McClintee, 6 S. & R. 259, Purviance was sued as a partner with S. Dryden, Jr. His defence was that he was not a partner, but merely a clerk, receiving as compensation for his services one-half the profits of a store kept at Lancaster. Tilghman, C. J., delivered the opinion of the court, and after citing Grace *v.* Smith, Waugh *v.* Carver, and Hesketh *v.* Blanchard, said: "In the present state of the world, we cannot afford to part with any of the safeguards against fraud. Every man who trusts the partnership, increases the fund to which creditors look for payment, upon the faith of its being applied in the first instance to pay the partnership debts; and, therefore, no man shall be suffered to diminish it, under the pretence of taking any part of the profits as a compensation for his services, without being himself responsible in case of loss. This is all fair in principle and good in practice. I argue, therefore, that if S. Dryden, Jr., was to take half the profits, he was, by operation of law, the partner of Purviance." So the case of Walden *v.* Sherburne, 15 Johns. 422 (which is not very unlike Waugh *v.* Carver in its facts), is sometimes cited as supporting the same principle. And to that effect is a remark of the court. But the decision is that the parties were *general* partners, and no distinction is drawn between partnership *inter se* and partnership as to third persons. And the facts certainly seem to make out a clear case of actual partnership. See also Miller *v.* Bartlet, 15 id. 137; Brown *v.* Cook, 3 N. H. 64; Miller *v.* Hughes, 1 A. K. Marsh. 181; Taylor *v.* Ferme, 3 Harr. & Johns. 505; Scott *v.* Colmesnil, 7 J. J. Marsh. 416; M'Donald *v.* Millaudon, 5 Miller, La. 403. There are also later cases, which must be regarded as decided upon the same grounds, or, at least, as giving a controlling, and, we think, undue influence to the fact of participation in indefinite profits. Thus, in Catskill Bank *v.* Gray, 14 Barb. 471, the facts were these: The Ulster Iron Company leased to Gray, for the term of five years, their manufacturing premises at S. *As rent of the premises,* G. agreed to pay the company one-fourth of the net profits arising therefrom; all expenses being deducted, except commissions on sales, G.'s personal services, and the general superintendence of the business. G. was to furnish all the finances necessary to carry on the manufacture, and to be allowed interest on his advances, and was at liberty to make re-

law has settled it otherwise. And then he remarks upon
* 76 the difference which * he supposes to exist on this point,

pairs at a cost of not over $5,000, for which the company were to allow him interest until the accruing rent should be equal to the expenditure. One-half the profits agreed upon as rent was to be paid annually; the balance at the end of the five years, with interest; such interest to be yearly added to the principal. Any loss that accrued was to be charged to the profit and loss account; but the company were not to repay any amount already received by them as rent, nor to be liable for any deficiency, at the end of the demised term. G. was to allow interest on all moneys in his hands arising from the manufacture. A certain kind of iron was allowed to be used, to be charged at its fair market price, the price and all other questions arising under the agreement to be settled by one J. T., of New York. Burt, the superintendent of the works, and who drew the bills on G. & Co., upon which the present action was brought, testified that the accounts of the concern were kept at the works with G. as lessee, that he acted as agent of such lessee, and received no directions from the Ulster Iron Company. This last evidence does not appear to have been regarded; but, upon a construction of the above agreement, the court *held*, that the Ulster Iron Company thereby stipulated for a specific interest in the profits, as profits, and were therefore liable as partners to third persons. The court took the whole agreement into consideration, but apparently only for the purpose of ascertaining whether the company were to be paid, *indefinitely*, out of the profits. The language is: "What was to be received by the company was only payable out of the profits actually made in the manufacture of iron. They had then a direct interest in such profits. As was said in Dob *v.* Halsey (16 Johns. 40), 'he who takes a part of the profits indefinitely, shall, by operation of law, be made liable for losses; upon the principle, that by taking a part of the profits, he takes from the creditors a part of that fund which is the security for the payment of their debts.' We think the error here lies, not in declaring that 'a specific interest in profits, as profits,' makes a man a partner as to third persons, but in assuming that a stipulation for a certain share of the profits necessarily gives such specific interest; that is, an ownership in the profits. There are certainly portions of the agreement which are not inconsistent with a contract of partnership; as the provisions respecting the kind of iron to be used, and the sharing of profits. On the other hand, the whole character of the transaction seems more consonant with the idea that it was a mere contract of lease, and that the company were interested in profits, not as owners, but merely as relying on them for payment." See further Cushman *v.* Bailey, 1 Hill, 526; Wood *v.* Valette, 7 Ohio St. 172; Churchman *v.* Smith, 6 Whart. 146; Holt *v.* Kernodle, 1 Ired. 199; Everett *v.* Coe, 5 Denio, 180; Buckner *v.* Lee, 8 Ga. 285. The decisions in Hodgman *v.* Smith, 13 Barb. 302, and Perry *v.* Butt, 14 Ga. 699, notwithstanding the *dicta* of the courts, do not seem at variance with true principles, all the circumstances considered.

But, in contradistinction to these cases, we may now examine those which, we think, must be regarded as proceeding upon, if not definitely establishing, a different and sounder principle. Thus, in the first place, it has been uniformly *held*, as in the English law, that mariners, who receive for their wages a share in the profits of a voyage, are not thereby made partners, either as to rights or as to liabilities. Rice *v.* Austin, 17 Mass. 197; Grozier *v.* Atwood, 4 Pick. 234; Coffin *v.* Jenkins, 3 Story, 108; The Crusader, Ware, 437; Reed *v.* Hussey, 1 Blatch. & Howl. Adm. 525; Duryee *v.* Elkins, 1 Abbott Adm. 529. And

between the English and American law, on the one hand, and Roman law and the modern * foreign law, on the * 77

the principle which has governed the courts, in these agreements with sailors, is, that, all the circumstances being considered, it is apparent that the parties never intended to give, nor did give, to the mariners the interest of owners in the undivided profits. In Baxter *v.* Rodman, 3 Pick. 435, the master and crew of a whaling-ship received, in lieu of wages, a proportion of the net proceeds of the oil obtained in the adventure. The court said: "That every seaman should be tenant in common with all the other seamen, the master, and the owners of the vessel, in all the oil which may be taken on a whaling voyage, so that no action could be brought respecting it without joining all, and none could be sued without the whole, giving every seaman a right to discontinue the action, or to release the claim, or to receive payment for the whole, would be a state of things not suspected by the wise and enterprising men who have carried on the whale fishery. But we think it is not the law. The owners of the vessel and proprietors of the voyage are the owners of the product of the voyage. The true meaning of the shipping contract is, that the men shall be paid out of the proceeds in a stipulated proportion. It is an agreement as to the mode of compensation, and gives them no property in the oil, but only regulates the amount of compensation." So, in Bishop *v.* Shepherd, 23 Pick. 494, where the court say: "It has often been held that upon these whaling voyages, carried on under a shipping-paper and form of contract like that exhibited in the present case, although the officers and seamen respectively are to receive a share of the proceeds of the oil and other acquisitions of the ship, as their only compensation, yet they are not partners or part-owners of the oil with the owners of the ship; but, on the contrary, the oil, *before division*, is the property of the owners. The oil, in the first instance, being the property of the owners, it remains theirs until some settlement or adjustment." For similar reasons, we think the courts have uniformly *held*, that a ship-owner who lets his vessel to another, in consideration of receiving a certain share of the gross or net proceeds of the adventure, is not liable to third persons as a partner with the hirer. Reynolds *v.* Toppan, 15 Mass. 370; Taggard *v.* Loring, 16 id. 336; Thompson *v.* Snow, 4 Greenl. 264; Cutler *v.* Winsor, 6 Pick. 335. See Holmes *v.* Old Colony R. R. Co., 5 Gray, 58, 60.

In Cox *v.* Delano, 3 Dev. 89, the question was whether Delano & Whelden were liable as partners under the following agreement: "The said Delano agrees to let a schooner," &c. "to the said Whelden, upon condition as follows: said Whelden to pay all charges of victualling and manning, together with all and other charges which may arise on said schooner, as long as he shall have possession of her, excepting such as are hereafter enumerated, which are to be paid by the said Delano; namely, one-half the expenses of port charges, one half the expense of lights used on board, and the wages of one seaman. . . . The said Whelden is hereby empowered to invest the proceeds of freight in such merchandise as he may think for mutual interest. All profit, over and above the expenses above mentioned, to be equally divided." It was *held*, that Delano & Whelden were general partners. The opinion of the court is well worthy of attention: "He who shares in the profits, which are nothing but the net earnings, should also share in the losses, if there be any. The *moral right* of making gains is based upon this principle. The rule is easily laid down; the difficulty is in its application. Where a part *of the profits themselves is the property* of the party, he is then a partner. Where their amount merely ascertains the amount of a debt or duty, but they

other. He holds that these latter systems of law create no
* 78 partnership between the parties as to third parties, * with-

themselves do not belong to the party, there it is not a partnership. Were there no special contract, but the case rested on the facts, part of the earnings would be the property of the defendant. . . . But there is in this contract a clause which, I think, puts the matter to rest; to wit: 'The said Whelden is hereby empowered to invest the proceeds of freight in such merchandise as he may think proper for mutual interest.' If a part of the freight was not the property of Delano, why was his consent necessary to invest it in merchandise? or why should he direct about it, if the whole was a mere contract of hiring, and the earnings referred to merely to fix the price to be paid?"

Entirely consistent with these last cases, and decided substantially, we believe, upon the same principle, are the leading and well-considered cases of Loomis *v.* Marshall, 12 Conn. 69, and of Denny *v.* Cabot, 6 Metc. 82. The facts in the two cases are very similar; and we may therefore examine them together. In Loomis *v.* Marshall, French & Hubbell, lessees of a factory, agreed with Marshall & Co. that the latter should furnish wool sufficient to supply the factory, F. & H. to manufacture the same into cloth of any color except blue. If, however, M. & Co. thought best to have any of the wool made into satinet, then they were to pay fifty-five per cent of the cost of warps for the same, F. & H. paying only forty-five per cent. The expenses of insuring the wool and cloth were to be borne by the parties in the ratio of their respective interests in the avails of the cloth; and, in case of the destruction of any wool or cloth, the amount received therefor was to be divided, as near as possible, according as either party should sustain loss. All the expense of making the wool into cloth and fitting it for market, except that of boxing, was to be borne by F. & H. The cloths when finished were to be at the disposal of M. & Co.; and the net proceeds of all said cloth, after deducting the incidental and necessary expenses of travelling and other proper charges of sale, were to be divided thus: M. & Co. to keep fifty-five per cent of the avails, and to pay over to F. & H. forty-five per cent. In like manner, in Denny *v.* Cabot, Hiram Cooper was the lessee of a mill, which, it was agreed C., A., and Co. should supply with wool, to be manufactured into cloth, as required by C., A., & Co. Cooper was to deliver the finished cloth to C., A., & Co. in Boston, to receive a certain sum per yard for manufacturing, and, if he fulfilled the above agreement, to have in addition one-third of the net profits, computed by deducting from gross sales a commission and guaranty of six per cent, and also all premiums, insurance, and other usual expenses. These being the facts of the two cases, it was decided in both that the parties supplying the wool were not liable as partners with those who manufactured it into cloth, and that the contracts between them were contracts of hiring, and not of partnership. The grounds of both decisions are also the same. In the first place, in both cases, it was asserted by the respective judges, that, in order to determine whether the facts before them constituted a partnership as to third persons, they must regard the *intentions* of the parties, and take into consideration the *entire* transaction between them. 2d. In both cases it was considered that the proceeds of the business belonged wholly to one of the parties; namely, to those who supplied the wool. This is to be gathered from the whole tenor of the opinion of the court in Loomis *v.* Marshall; and in Denny *v.* Cabot, Wilde, J., expressly says: "The satinets were therefore unquestionably the property of Cabot, Appleton, & Co." And again: "The property and the profits of the transaction belonged to Cabot, Appleton, & Co." 3d. All the circumstances being

out their consent, or against the stipulations of their own contract; and he also expresses the opinion, that "the common

considered in both cases, it was *held*, that the parties manufacturing the goods had not a specific interest in profits, as profits. Thus, Huntington, J., in Loomis *v.* Marshall, says: "In many of the cases to which we have referred, the language of the arguments was not more explicit than in the one now under consideration; but, looking at the *entire* transaction, such was considered the obvious meaning of the parties. French & Hubbell had no other interest in the profits than such as arose from the agreement to pay for their labor, &c., in a specific proportion of the amount of the sales of the manufactured article." It is to be observed, that in both these cases the funds to be divided were the gross proceeds of the sales, reduced, not by the expenses of the business, but simply by the expenses of the sales. In Loomis *v.* Marshall it was strongly pressed upon the court, that as the *net sales*, and not the *net profits*, were to be divided, there could be no community of interest in the *profits*. But the court thought it unnecessary to decide that point. In Denny *v.* Cabot, the opinion of the court would seem to be that the distinction between gross and net profits was not a sound one, though in that particular case it was considered that the agreement was substantially to divide the gross earnings. See page *88 and note.

The principles of Loomis *v.* Marshall and of Denny *v.* Cabot are supported by many other American cases, both prior and subsequent. In Massachusetts, the decisions seem to be quite uniform. Reynolds *v.* Toppan, 15 Mass. 370; Rice *v.* Austin, 17 id. 197; Turner *v.* Bissell, 14 Pick. 192; Blanchard *v.* Coolidge, 22 id. 151; Bradley *v.* White, 10 Metc. 303; Judson *v.* Adams, 8 Cush. 556. In a very recent case in that State, Dewey, J., delivered the opinion of the court, as follows: "It is contended, on the part of the plaintiffs, that the stipulations existing between the Old Colony Railroad Corporation and Parker & Tribou, the lessees of the hotel called the Samoset House, in relation to the leasing of said house, were such as to render the Old Colony Railroad Corporation a partner in the concern, and liable, as such, to creditors who may have furnished provisions and other articles for the hotel, at the request of Parker & Tribou. Such copartnership is supposed to arise from the agreement between these parties, providing that the Old Colony Railroad Corporation shall receive for the use of the premises leased, in addition to the sum of five hundred dollars for the use of the furniture, 'one-half of the net proceeds arising from keeping the house as a hotel.' Whatever doubts may formerly have existed as to the effect of an arrangement like that made in the present case, entitling the lessee to receive, as a compensation for the use of his property or capital stock, one moiety of the net proceeds arising from the business transacted, that question seems now fully settled, at least in this Commonwealth. It is no longer true that receiving one-half of the profits, or one-half of the net profits, arising from articles manufactured and sold, or resulting from business in which one furnishes the stock in trade and another performs the labor, necessarily creates a partnership. It is always competent to look at the particular circumstances of the case, and ascertain thereby whether it may not be merely a compensation to a party for his labors and services, or for furnishing the raw materials, or a mill privilege, or a factory, from which the other is to earn profits. Story on Part. § 36. This question was very fully considered in the case of Denny *v.* Cabot, 6 Metc. 82, where it is said by Judge Wilde, in delivering the opinion of the court: 'Where a party is to receive a compensation for his labor, in proportion to the profits of the business, without having any spe-

* 79 law seems * to have pressed its principles on this subject to an extent not required by, even if it is consistent with, natural justice." (*m*)

cific lien on such profits, to the exclusion of other creditors, there seems to be no reason for holding him liable as a partner, even to third persons.' 6 Metc. 92. That case was followed by Bradley *v.* White, 10 Metc. 303, where the question arose upon an agreement that A. should furnish the goods for a store, and pay all expenses, and B. should transact the business of the store, and receive half the profits for so doing; and it was *held*, that this did not constitute B. a partner, and that he was not liable to a creditor who had furnished goods for such store. It may be further remarked, that in relation to contracts for the chartering of vessels, where it was stipulated that the owner of the vessel should receive a certain percentage on the profits of the voyage, it was early *held*, that such an interest in the profits did not constitute a partnership. Reynolds *v.* Tappan, 15 Mass. 373; Cutler *v.* Winsor, 6 Pick. 335. In looking at the particular contract existing between these parties, it is quite obvious that no partnership was contemplated by them. It was a part of the stipulation, clearly expressed, that the labor and expenditures in carrying on the hotel were matters solely in the hands of Parker and Tribou, and all bills were to be paid by them. The articles bought by them were their own property, as were all moneys received from the guests of the house; and the Old Colony Railroad Corporation had no right or authority over either. It seems to us to have been, on the part of the Old Colony Railroad Corporation, a mere leasing of the house and furniture, but making the rent of the former to depend wholly upon the success of the establishment. If no profits were realized, they would receive no rent; but, beyond this, they were not to be affected by the losses that might occur in the keeping of the hotel.' The agreement on the part of Parker and Tribou to keep exact accounts of all receipts and expenditures, which should be open to the inspection of the corporation, was a proper arrangement to carry out the fulfilment of the stipulation to pay one-half of the net proceeds arising from keeping the house, for rent of the same, and does not necessarily import any partnership in the proceeds thus received by Parker and Tribou. Applying to the present case the legal principles so fully settled in the cases above referred to, the court are of opinion that this action cannot be maintained against the Old Colony Railroad Corporation." Holmes *v.* O. C. R. Co., 5 Gray, 58. See also Bucknam *v.* Barnum, 15 Conn. 67; Clement *v.* Hadlock, 13 N. H. 185; Tobias *v.* Bliss, 21 Vt. 544; Heckert *v.* Tregely, 6 Watts & S. 139, where the facts are quite analogous to those of Loomis *v.* Marshall; Bowyer *v.* Anderson, 2 Leigh, 550; Brown *v.* Higginbotham, 5 id. 583. The case of Barckle *v.* Eckhart, 1 Denio, 337, confirmed on appeal, 3 Comst. 132, deserves particular notice in this connection. There, G. & Co., partners in general trade, being in need of some one to attend to the particular business of purchasing and forwarding western produce, employed E., the defendant, for that purpose. As a remuneration for his services, E. received one-fourth of the profits coming to G. & Co. from the western produce business, but had no farther interest in the affairs of G. & Co., and had always acted, not as their partner, but their servant. It was *held*, that E. was not a partner as to third persons, with G. & Co.; since, from the whole nature of their relations, it appeared that E.'s interest in the profits was merely that of an agent relying on them for compensation. A similar decision was made in

(*m*) Story on Part. §§ 36, 37.

We * are, however, constrained to doubt whether * 80
the common law is open to this objection, and also
whether it differs on this subject * so much as is inti- * 81
mated above, from the Roman law and the modern
foreign law.

* This question, as to the intention of the parties, may * 82
be considered as presenting itself under three forms.
First, if we suppose * that the parties make a contract * 83
which provides for some joint action or joint property,
but does not produce that community of * property, or * 84
business and profit, which the law regards as constitut-
ing partnership, and in the same contract declare that
they are * not to be partners, — then, by every system * 85
of law they are not partners. Their intentions as ex-
pressed, and as they are to be * inferred from the terms * 86
of their bargain, are the same; and they prevail.

Vanderburgh *v.* Hull, 20 Wend. 70, where the question was whether a person with a salary of $300 guaranteed to him, and a right to one-third of the profits, if there were any, though he was not to be liable for losses, was a partner as to third persons with the plaintiff; and it was held that he was not a partner, and was competent as a witness for him. See farther Fitch *v.* Hall, 25 Barb. 13; Dawham *v.* Rogers, 1 Barr, 255; Johnson *v.* Miller, 16 Ohio, 431; Reed *v.* Murphy, 2 Greene (Ia.), 574; Hodges *v.* Dawes, 6 Ala. 215; Scott *v.* Campbell, 30 Ala. 728; Shropshire *v.* Shepherd, 3 id. 733; Bartlett *v.* Jones, 2 Strobh. 471; Brockway *v.* Burnap, 16 Barb. 310. From this review of the leading cases, we conclude that the rule of Waugh *v.* Carver, that an indefinite participation in profits makes a man a partner as to third persons, because by such participation the fund on which creditors rely is diminished, is not established by the mass of either English or American authorities. On the other hand, we think, that, notwithstanding *dicta* of immense weight apparently to the contrary, the cases show that there are but two grounds upon which a man can be liable as partner to third persons; and that, if a man has not been held out as partner, he can be chargeable as such, only when he holds that relation to profits which we believe to be the ultimate test of partnership, both *inter se*, and as to third persons; that is, unless he has some ownership in or of the profits as they accrue and are not yet ascertained or divided into portions. [A contract that one party shall furnish money and the other perform the labor for the accomplishment of a particular enterprise, sharing equally in the profits, is a partnership as to third parties. Pettee *v.* Appleton, 114 Mass. 114; Rowland *v.* Long, 45 Md. 439.] See, for the latest cases on this important question, Gibson *v.* Stone, 43 Barb. 285; Smith *ads.* Perry, 5 Dutch. 74; Voorhees *v.* Jones, id. 270; Wheatcroft *v.* Hickman, 9 C. B. N. S. (99 Eng. Com. L. R.) 47; s. c. 8 H. of L. Cas. 268; Berthold *v.* Goldsmith, 24 How. (U. S.) 536; Stevens *v.* Faucet, 24 Ill. 483; Robbins *v.* Laswell, 27 Ill. 365; Fawcett *v.* Osborn, 32 id. 411; Macy *v.* Combs, 15 Ind. 469; Reynolds *v.* Hicks, 19 id. 113; Braley *v.* Goddard, 49 Me. 108; Atherton *v.* Tilton, 44 N. H. 452; Whitney *v.* Ludington, 17 Wis. 140. [See *ante*, pp. * 75, note, and * 67, note.]

In the second place, let us suppose the parties expressly make and carry out in act an agreement to enter into such community of property, or business and profit, as constitutes a partnership, and say nothing about partnership. The law now says, You intended to enter into partnership, you have carried out your purpose, and you are partners; and it is a matter of no moment that you have not given to yourselves this name. Here, also, the intentions prevail.

In the third case, we suppose that parties to an agreement like the last have added to that agreement the declaration that they do not intend to be, and are not made by their bargain, partners. (*n*) In our opinion, the law would say,
* 87 Your intentions are * the same as they were before, and shall prevail as before. While agreeing to become partners in fact, you deny the name; and whether you do this ignorantly and innocently, or in fraud, matters not: your assertion cannot prevail over the fact, and your actual intentions govern, instead of your declared intentions.

We apprehend that the law looks first, and we had almost said only, to the intentions of the parties. But these it gathers

(*n*) This may perhaps be illustrated by the following case: A. & B. dissolved partnership. But, A. continuing the business, it was agreed that he should take all the remaining stock in trade, and the notes and accounts due to the firm, and should pay the outstanding debts of the concern. B., the retiring partner, *in consideration of his interest in the stock of goods and debts*, was, from the date of the dissolution, to have one-third interest in all the profits arising from the sale of said goods, was to share one-third of the losses, and, further, was to act as A.'s clerk in the sales of the goods. Clearly, the circumstances of the dissolution of the partnership, and of B.'s agreeing to act thenceforward as A.'s clerk, indicated that, after their dissolution, the parties did not intend to be partners. But the court *held*, that, under the contract made upon the dissolution, A. and B. *were* partners not only as to third parties, *but inter se*. Say the court: "If the agreement had been merely that the plaintiff (A.) should compensate the defendant for his services as clerk, by giving him one-third of the profits, the relation of partners, as between themselves, would not have resulted; nor would such partnership have been inferred, from the fact that the defendant's compensation, as clerk, was to be determined by ascertaining how much one-third of the profits would be, after the deduction of losses. The evidence does not tend to show such a state of facts. The agreement that the defendant should have one-third of the profits was not in consideration of his services as clerk, but of his interest in the debts and stock of goods. . . . The defendant's agreement was, not simply that the losses should be deducted before his share of the profits was ascertained, but that he would share one-third of the losses." . . . Scott *v.* Campbell, 30 Ala. 728.

from the whole contract, and all the words and all the acts of the parties. (*o*) It is not necessary that the intention of being partners should be declared in words; for the law supplies the want of these words. And if one intention is plainly implied in the bargain itself, and another is asserted in words, the actual intention prevails over the verbal one.

We might suppose a case, or indeed refer to one, in which parties agreed to become partners in a business, and then proceeded to frame such terms and provisions as left them without any community of interest in the property, business, or profits; and certainly they would not be in law, any more than in fact, partners. (*p*) Although, even in this case, if they made known their agreement to be partners, they might then be bound, as such, to third parties, on the ground that they held themselves out as partners, which is sufficient of itself.

In other words, while it is undoubted law, that one held out as a partner, with his own consent, is liable as such whether he be a * partner in fact or not, it is not true that one * 88 who is a partner in fact is not liable *unless* he is also held out as such; or that he is not liable because he declares, either in his contract or elsewhere, to one person or to any person, that he is no partner.

We are unable to see any other alternative, but to adopt these views, or else to say that persons may enter into actual

(*o*) See Loomis *v.* Marshall, 12 Conn. 69, and Denny *v.* Cabot, 6 Metc. 82, which cases illustrate the regard which the courts pay to the intentions of the parties, as gathered from a view of their entire contract, and of all the circumstances bearing upon it. See also, to the same point, opinions of Bramwell and Martin, BB. in Hickman *v.* Cox, 3 C. B. N. S. 523. Vibbard *v.* Roderick, 51 Barb. 616.

(*p*) In Oliver *v.* Gray, 4 Ark. 425, Oliver sued Gray on a note. Gray filed, by way of set-off, an account for keeping a horse. To prove his account, Gray produced an agreement under seal, by which it was stated that Oliver had sold Gray half of a certain horse, and that Gray was to keep him for eighteen months, "and the partners, Gray & Oliver," were to pay an equal portion of the expense of the horse during that time. By the court, Dickinson, J.: "The plaintiff in error insists that there was no debt due by Oliver to Gray, but to them jointly, as partners. We apprehend there is nothing in the contract constituting them partners. There is certainly no community of profit and loss arising out of their agreement. It amounts, in our opinion, to a mere joint interest in the horse alone, and an agreement on the part of Oliver to pay Gray one-half of the actual expenses incurred in keeping him. They styled themselves partners in the contract, yet the nature and terms of the agreement clearly show they are merely part-owners."

partnership, and enjoy all its facilities, credit, and advantage, but escape all its liabilities because they see fit to deny them. And we think no system of law, ancient or modern, would come to this conclusion. We do not propose to exhibit the Roman law on this subject at any length; but we think it fully sustains what we have said above. Indeed, by that law almost all the questions of partnership passed under the Pretorian jurisdiction (which was an equitable one in fact, in the modern use of the term) in somewhat the same way and for the same reasons as they have come under the equity jurisdiction in England and here.

In this connection we would advert to a distinction which ran through a number of cases, and seemed for a while to meet with much favor. It was this: One who receives a certain portion of the *gross receipts* is not a partner; but, if he receives the same portion of the *net profits*, this constitutes him a partner, and makes him liable as such. We do not think this distinction very reasonable or very useful. It may, in some cases, help to determine whether the parties had made a bargain by virtue of which the receiver of this portion acquired a property in the undivided profits, and so far it may be of use, but no further. The rule, however, has been so often and so strongly insisted upon, that we examine very fully, in our note, the authorities on which it seems to rest. (*q*)

(*q*) Of this distinction between gross and net profits, it is to be observed that it cannot be founded upon, nor does it support, the principle asserted in Waugh *v.* Carver, that he who shares in profits indefinitely is liable as partner to creditors, because he takes from that fund which is the proper security to them for the payment of their debts. If the diminution of the fund on which creditors rely were the true ground of a man's liability as partner, the receiver of gross profits should, it would seem, be charged as partner, rather than the receiver of net profits; for the latter takes from that fund only if profits are netted, while the former does so whether the business is profitable or not, and may therefore even lessen the capital.

The case commonly cited in support of the distinction is Dry *v.* Boswell, 1 Camp. 329. There the action was assumpsit for work and labor, and materials in and about the repairs of a lighter. The only question was, whether the defendant was liable for the repairs, which were admitted to have been made. The witnesses first stated, that the lighter was the sole property of a person of the name of Russell; that she was let out by him to the defendant, who worked her; and that the two shared her *profits* equally between them. Lord Ellenborough said, in that case the defendant was to be considered a partner, and was jointly liable for the repairs done to the lighter. There was here a partici-

* It has been asserted, not only by text-writers, but * 89
by eminent * judges, that a person is liable as a partner, * 90

pation of profit and loss which constituted a partnership.

But the agreement with Russell subsequently appeared to be that the defendant, in consideration of working the lighter, should receive half her *gross earnings*, and that Russell, as owner, should receive the other half.

Lord Ellenborough observed, that this was only a mode of paying the defendant wages for his labor, and was different from a participation of profit and loss; so that, under these circumstances, no partnership could be considered as existing between him and the owner of the lighter. See Pott *v.* Eyton, 3 C. B. 32.

In this country, the distinction drawn in Dry *v.* Boswell has been approved in a number of cases. See Ambler *v.* Bradley, 6 Vt. 119; Bowman *v.* Bailey, 10 id. 170; Mason *v.* Potter, 26 id. 722; Turner *v.* Bissell, 14 Pick. 192; Heimstreet *v.* Howland, 5 Denio, 68; Everett *v.* Coe, id. 180. The facts of Patterson *v.* Blanchard, 1 Seld. 186, are thus stated in the opinion of the court: "In the case under consideration, each party was to stock a particular portion of the stage route from Saratoga to Sandy Hill, Glen's Falls, and Whitehall, and each was to receive fare for the passengers in proportion to the distance they should be by them respectively conveyed. Neither party had, by the terms of the contract, any interest in or control over the stock or road of the other; nor were any expenses upon any part of the route to be borne jointly. The question of their liability to third persons is not here involved. . . . By the demurrer it is admitted to be a simple case of shares in the fares in proportion to the distance the passengers and their baggage were conveyed by each, from which no deduction was to be made for joint expenses or losses of any description; the funds to be divided were their gross earnings, and not profits, *as profits*. To constitute persons partners as between themselves, there must be an interest in the profits, *as profits*. Each party must, by the agreement, participate in some way in the losses as well as the profits; an agreement to divide the gross earnings, as in this case, does not constitute a partnership." Beecham *v.* Dodd, 3 Harrison, 485; Moore *v.* Smith, 19 Ala. 774. See Wood *v.* Valette, 7 Ohio St. 172.

But the principle of the case of Dry *v.* Boswell, if it is understood to be that the sharer in gross receipts is, as a conclusion of law, not a partner, is not only erroneous in principle, but is also, we think, opposed by weighty authority. In Cheap & Others, Assignees, *v.* Cramond, 4 B. & Ald. 663, Abbott, C. J., said: "The facts are these. The defendant, having occasion to send goods to Rio Janeiro, for sale there, applied to the bankrupts for recommendation to a house at that place. They recommended Ruxton, and the goods were consigned to him. Ruxton was to remit the proceeds, in money or goods, to the bankrupts; who were to pay over the money to the defendant, or sell the goods, and account to him for the proceeds. The correspondence was carried on between the bankrupts and Ruxton, the defendant not communicating directly with Ruxton. The latter sold the goods, and having advised the bankrupts thereof, they advanced a sum of money to the defendant, in anticipation of the remittance expected from Ruxton; and the latter having failed, and made no remittance, this action was brought to recover the money so advanced. And, if there had been nothing more in the case, the plaintiffs had an undoubted right to recover. But it came out at the trial, that the bankrupts and Ruxton were in the habit of dividing equally the commissions received by each other on the sales of all goods recommended, or 'influenced,' according to the expression of the witnesses, by the one house to the other; and, according to this habit

* 91 to third parties, when * he has such an interest in profits
* 92 as will give him a right to an * account. (*r*) Undoubtedly,

and course of dealing, the bankrupts were entitled to half the commission received by Ruxton on the sale of the defendant's goods, and he would be entitled to one-half of the commission, if any charged by them, on their receipt of the proceeds in London, had the proceeds been duly remitted. And, upon this evidence, it was contended, on the part of the defendant, that the bankrupts were to be considered as joint factors, or partners *quoad hoc*, with Ruxton, and consequently that his receipt was in effect a receipt by them; and so the advance of money by them to the defendant was, in effect, merely a payment of money for which they were previously accountable to him. And in support of this proposition, the case of Waugh *v.* Carver, 2 H. Bl. 235, was cited and relied on. And we are all of opinion that the present case cannot be distinguished in principle from that, and that our decision must be governed by it. It is true, that in that case a definite part of the commission was, by agreement of the parties, to be deducted as compensation for the charges and expenses before a division took place; and also that each party was to share in some specified measure with the other, in other parts of the profits of their respective business, such as warehouse rents and discount upon tradesmen's bills. And it was contended, in this case, on the part of the plaintiffs, that the bankrupts and Ruxton were to be considered as dividing the gross proceeds only, and not the net proceeds or profits of each other's agency or factorage; and that a division of gross proceeds does not constitute a partnership. We think, however, that the previous deduction of a definite part of the commission before the division in the case cited, is an unimportant part. It cannot have the effect in all cases of leaving the remainder as clear profit, because the expense and charge cannot be in all cases uniformly the same, but must vary with the particular circumstances of each transaction; so that in effect a part only of the gross commission, or proceeds, of the agency, and not the whole, was to be divided in that case; and taking the definite deducted part at a fifth, or any other aliquot part, the absent house, instead of receiving one-half, as in the case at bar, would by the agreement receive two-fifths, or some other definite part of the whole gross sum, and not an indefinite part thereof, depending upon the actual and clear profit of the transaction. And although, in the case of Waugh *v.* Carver, the agreement was not confined to a division of the commission, but extended also to the moneys received in certain other parts of the transactions of the two houses, yet the principle of the division is not affected by that circumstance; the principle being, that, where two houses agree that each shall share with the other the money received in a certain part of the business, they are, as to such part, partners with regard to those who deal with them therein, though they may not be partners *inter se.*" See also remarks of Martin, B., upon the distinction between gross and net profits, in Hickman *v.* Cox, 3 C. B. N. S. 562.

In Loomis *v.* Marshall, 12 Conn. 67, the parties sought to be charged as partners were to divide between them the proceeds of the sales of the goods, diminished only by the cost of *selling*. The difference between net *profits* and net *sales* was pressed upon the court. But it was not thought necessary to

(*r*) 3 Kent Com. p. 25, note (*b*); Cary on Part. 11, note (*i*); Collyer on Part. § 44, and note; Lord Eldon in *Ex parte* Hamper, 17 Ves. 412; Chancellor Walworth in Champion *v.* Bostwick, 18 Wend. 184. See also Heimstreet *v.* Howland, 5 Denio, 68; Denny *v.* Cabot, 6 Metc. 92.

every partner has a right to an account of the profits; but the converse is not true, that every one who has such a right is

express any opinion upon the point. In Denny *v.* Cabot, 6 Metc. 82, the fund to be divided was substantially the same: "For (we quote the language of the court) although, in terms, the agreement was to pay Cooper one-third of the net earnings, yet that is explained by the words immediately following, by which it appears that Cooper was entitled to one-third of the gross profits after deducting certain specified charges; and that in no event was he to be liable for any losses." The court then cite Loomis *v.* Marshall, *supra;* Reynolds *v.* Topham, 15 Mass. 370; Vanderburgh *v.* Hall, 20 Wend. 70; Turner *v.* Bissell, 14 Pick. 192; and proceed thus: "These cases appear to us fully to support the defence in the present case. Some of them may perhaps appear to clash with the distinction (laid down by Lord Ellenborough in Dry *v.* Boswell, 1 Camp. 329, and recognized in other cases) between sharing the gross earnings and sharing the net earnings of a business or adventure. But, however this may be, we think there is no sound distinction between an agreement to pay to a party a certain share of the gross profits, and an agreement to pay a certain share of the net profits, as explained in the present contract; the clear meaning of the terms of which is, that Cabot, Appleton, & Co. were to pay Cooper one-third part of the profits, after making certain specified deductions therefrom, and Cooper clearly was not to be liable for any losses. If he had stipulated for a share in the profits (*whether gross or net profits*), so as to entitle him to an account, and to give him a specific lien, or a preference in payment over other creditors, and giving him the full benefit of the profits of the business, without any corresponding risk in case of loss, — justice to the other creditors would seem to require that he should be holden to be liable to third persons, as a partner.

We think, then, the distinction drawn in Dry *v.* Boswell, between the gross and the net profits of a business, derives no very strong support from the authorities. Still less has it any foundation in the true principles applicable to the subject. As we have already seen (see *ante*, p. *41, and note), it is entirely consistent with the existence of an actual partnership, that one or more of its members should not be subject to any losses; since such exemption from loss may be merely the consideration in view of which one partner contributes to the firm more capital than the other partners, or accepts for an equal contribution a smaller return. Hence the reason for the rule, that the participator in the gross receipts of a business is not a partner, cannot be that he is thereby exempt from losses, and that such exemption from losses is necessarily opposed to the existence of an actual partnership. Nor can the ground of this distinction be, that the gross proceeds of a trade and the net proceeds are two different funds, an interest in the former of which never makes a man a partner, while an interest in the latter always does. Whether a man is a partner or not depends upon the nature of his interest in the profits. The profits of a trade are included within the gross proceeds; and, if a man is interested as owner in the latter of these funds, he must be so also in the former; for there is nothing in the mere deduction of the expenses of a business from its proceeds which affects in any way the kind of interest of those concerned therein. Hence the question still must be, not whether a man shares in gross or in net receipts, but what is the nature of his interest in either of these funds? If his interest is that of owner, then he is a partner; otherwise, not.

The doctrine which Story deduces from the authorities, and to which he gives his approval, is, that a participation in the net proceeds of a business

a partner. There are many ways in which a man may represent another, and in that right be entitled to an account without being liable as a partner. And it has been well said by a recent writer, "In all cases where a person is to be paid for his services by a sum *proportional* to the profits, he must be entitled to an account of profits. If not, how is he to ascertain that he has what he has stipulated for?" (*s*) It must be, however, considered as now settled that a person paid for services rendered to a firm by a share of the profits, if this be given him only as compensation for service, and he has no interest in the principal and no other interest in the profits, is not liable as a partner. (*ss*)

The many cases cited in the notes to this chapter exhibit in strong light the difficulty, if not impossibility, of drawing from the decisions any definite principle or rule applicable, with certainty, to the question, "Who are partners as to third persons?" This uncertainty has recently led, in England, to a very important statute, 28th & 29th Vict., ch. 86, which
* 93 we give in our note. (*t*) * We will add our hope

is presumptive proof that the participator is a partner, while a participation in gross proceeds is presumptive proof that he is not one. Story on Part. §§ 34–39. But the true doctrine, as suggested in the text, would seem to be, that the sharing in the gross or in the net receipts of a business is a fact from which, in connection with the other facts of the case, the jury may infer that the parties have or have not that interest in profits requisite to make them partners. And all the facts may show that the participator in net proceeds is not a partner, or that the participator in gross proceeds is one.

(*s*) Bissett on Partnership, p. 14.

(*ss*) Besides the cases already cited, which bear upon this question, see Conklin *v.* Barton, 43 Barb. 435, where it is directly decided.

(*t*) By this act, after reciting that it is expedient to amend the law relating to partnership: It is therefore enacted as follows: 1. The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking, upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such. 2. No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking, by a share of the profits of such trade or undertaking, shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner. 3. No person, being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of or to be subject to any liabilities incurred by such trader.

and our belief, that the courts of this country will regard this statute rather as declaratory of the law-merchant in respect to partnerships, than as changing that law; and will apply to cases which come before them the principles on which the statute is founded. It will be noticed, that the last section applies the word "person," in the construction of this statute, to a partnership as well as to a corporation; a provision which accords with views which we have repeatedly expressed in this work.

SECTION III.

HOW FAR STIPULATIONS BETWEEN THE PARTNERS AFFECT THIRD PARTIES.

We shall hereafter consider fully the subject of articles of partnership. In this connection, we say only that it is unquestionably a rule of English and American law, which has few if any exceptions, that if parties enter into a contract of actual partnership, and also into stipulations as a part of this contract, or independent of it, which either in whole or in part deny or qualify the liabilities of one or more of the partners, such stipulations would have no effect whatever upon third parties who acted with the partnership in good faith, believing and justified in the belief that it was a partnership, and in ignorance of these special stipulations. (*u*) It is a more difficult and com-

4. No person receiving, by way of annuity or otherwise, a portion of the profits of any business, in consideration of the sale by him of the goodwill of such business, shall, by reason only of such receipt, be deemed to be a partner of or be subject to the liabilities of the person carrying on such business. 5. In the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than 20*s.* in the pound, or dying in insolvent circumstances, — the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any such vendor of a good-will as aforesaid be entitled to recover any such profits as aforesaid until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied. 6. In the construction of this Act the word "person" shall include a partnership firm, a joint-stock company, and a corporation. [It is said in Holm *v.* Hammond, L. R. 7 Ex. 218, that the effect of this statute is, that sharing in the profits, by a lender, is no evidence of a partnership. See also Leggett *v.* Hyde, 58 N. Y. 272.]

(*u*) See *post*, ch. 7, § 7.

plicated question, what effect such stipulations have when made known to third parties. This we will proceed to consider.

The two principles which apply to this question, and which we must reconcile as far as this can be done, are these: First, if one is a partner in fact, and has all the advantages and credit belonging to his partnership, he is to be held to his liabilities, however he may disclaim them at any time, or seek to escape from them. The other principle is this: Every man has a right to put what qualifications or limitations he pleases to his bargain with another, and that other is bound by
* 94 these if he accepts them; and, *generally, will be taken to accept them, if they are distinctly made known to him while making his bargain. These principles meet in a somewhat fluctuating point, which now inclines nearer to the one and then approaches the other of them.

In general, we should say, that a provision in partnership articles, that the partners would not come under these liabilities, nor confer upon each other those rights and powers which belong to the law of partnership, would so far annul the contract that it would not be a contract of partnership as to those who were informed of them. Suppose, for example, that some three merchants should advertise that they entered into a copartnership from the first of January next for five years, to transact commission business, under the name and style of A., B., & Co., but that neither of the partners would be liable on any contract he did not himself make, nor for any goods not sent to him personally, and receipted for by him, nor on any note or obligation not signed by him. It might be said that this was an advertisement in fact that they were not partners; and anybody who knew it and still made a contract with one, using the name of the firm, could not hold the rest, because he made no contract with them. Still, such facts would raise the question, whether there was not here an evasion of the law; and, if the three were joined in the business and in the ownership of the property and of the profits, whether all should not be held liable in the usual way; certainly, to a customer to whom the peculiar restrictions were not distinctly known, and perhaps even to one who knew the advertisement, on the ground that

their acts contradicted their words, and that while they said substantially they were not partners, they were so in fact. So if the advertisement were that two of the partners would be liable as usual, but that the third, designated by name, was not, by agreement with the rest, to participate in the losses or be liable for the debts, such a stipulation, even if advertised, would suffice to discharge this partner, if in fact he participated in the profits as a partner. One reason for this doubt would be, that, if the stipulation when so made known took effect, the statutory introduction of limited partnerships would not have been necessary; and they would now exist in England, as well as here, at the pleasure of the parties, and the somewhat cumbrous machinery of our statutes of limited partnership would never be resorted to, because wholly unnecessary.

* Stipulations of this kind are rare, and such advertisements never appear. We have supposed them, however, as they may help us to come to a right conclusion upon a class of questions frequently presented in fact. For stipulations frequently occur in articles which limit in various respects and degrees the power of each partner to represent or bind the rest, or of some one or more to bind the others. If these stipulations are wholly unknown to third persons, they are wholly inoperative as to them. But the present question is, what effect they have when made known, either publicly or personally, to some third party who deals with the partnership. * 95

The general principle which lies at the foundation of the partner's liability is, that every partner has full and absolute authority to bind all the partners by his acts or contracts, in relation to the business of the firm, in the same manner and to the same extent as if he held full powers of attorney from all the members. No principle is better established than this: it rests not only on universal usage and universal authority, but on obvious reason and necessity; because, if the rule were otherwise, a very large proportion of the advantages and facilities for which partnerships are formed would be lost. It must, however, be remembered that a partner binds the firm, necessarily only when he uses the name of the firm. Hence it has been held that the execution of a mortgage of personal property

of a partnership, by one partner in his individual name, passes no title. (*uu*)

This authority of each partner is only an implied one. It is a fair inference from the fact of partnership: it is an inference from the reason of the thing, as well as from the rules of law. But it is an inference which cannot be made when the partners disclaim it, honestly, in a reasonable way, and by act as well as word. Hence, if the act of a partner be forbidden by his copartners, and notice is given to the person with whom he deals, he no longer acts as their agent, and his act is only his own. (*uuu*) The great difficulty is in drawing the line between a rule which would give to any partner, at his own pleasure, all the advantages and none of the liabilities of a partner, and, on the other hand, permitting reasonable and honest limitations or qualifications of liability which ought to operate on all who have contracted with full knowledge of them, and have therefore assented to them. (*v*) It should be added, that the question

(*uu*) Clark *v.* Houghton, 12 Gray, 38; and see Butterfield *v.* Hensley, id. 226; and Cummings *v.* Parish, 30 Miss. 412.

(*uuu*) Yeager *v.* Wallace, 57 Penn. St. 365.

(*v*) Thus, in Alderson *v.* Pope, 1 Camp. 404, note (*a*), Lord Ellenborough *held*, that when there was a stipulation between A., B., & C., who appeared to the world as copartners, that C. should not participate in the profit and loss, and should not be liable as partner, C. was not liable as partner to those who had notice of this stipulation, and that notice to one member of a firm was notice to the whole partnership. Compare with this case Brown *v.* Leonard, 2 Chitty, 120. In Batty *v.* M'Cundie, 3 C. & P. 202, the defendants had become shareholders in a newspaper, the prospectus of which Col. Jones, one of the plaintiffs, who were partners, had been concerned in preparing, and which stated that the subscribers were not to be partners, and were not to be liable for more than their subscriptions; the present suit being brought for the price of stationery furnished for the newspaper. Parke, J. (in summing up), said: "The question is, whether Col. Jones, having a knowledge of all the circumstances, can maintain the action; for it is clear that his knowledge is the knowledge of all the plaintiffs. There is no doubt that the defendants were proprietors; but that will not make them partners. The question is, whether Col. Jones did not know that these persons, though called proprietors, were not to be deemed partners, and whether he did not give them an assurance that they would not be liable for more than their subscriptions? The prospectus states that the subscribers are not to be partners; and it is proved that he knew of that prospectus, and acted as treasurer under it. How can he, after this, say that the defendants are liable? The question for our consideration is, whether Col. Jones does not accede to the proposition, that the defendants are not liable, and undertake that he will not look to them as responsible? If you believe the evidence in the sense that I have taken of it, I tell you, that, in point of law, the plaintiffs are not entitled to recover." *In re* Worcester Corn Exchange Co., 3 De

whether, in any * particular case, an alleged partner has * 96
disproved the evidence or * rebutted the legal presump- * 97

G., M. & G. 180, 19 Eng. L. & Eq. 627; Bailey *v.* Clark, 6 Pick. 372. See also Boardman *v.* Gore, 15 Mass. 339; Baxter *v.* Clark, 4 Ired. 127; Denny *v.* Cabot, 6 Metc. 93; Jordan *v.* Wilkins, 3 Wash. C. C. 115; Dow *v.* Sayward, 12 N. H. 271; Cargill *v.* Corby, 15 Mo. 425; Langan *v.* Hewett, 13 S. & M. 122; Brent *v.* Davis, 9 Md. 217. In Leavitt *v.* Peck, 3 Conn. 124, Hosmer, C. J., says: "It is a well-established principle, that the contract of a partner is obligatory for his copartner, by virtue of an implied authority, which may be rebutted by a refusal to be bound by his acts. By legal consequence, the partners whose authority is thus declined cannot bind the copartnership in favor of those who have knowledge of the fact. . . . The principle under consideration is not founded at all on any supposed waiver of the creditor, but solely and exclusively on the declaration of the person declining to be bound. The implied authority of his partner he has annihilated; and the contract in the name of the firm is of no validity beyond the personal obligation it imposes on the individual making it." So if, upon the dissolution of a copartnership, the outgoing partner assigns to the continuing partner all his interest in the outstanding partnership debts and accounts, the subsequent release of a debt by the outgoing partner to a debtor having notice of the agreement is void. Gram *v.* Cadwill, 5 Cowen, 489. See *Ex parte* Harris, 1 Madd. 583.

Partners sometimes give notice to particular persons, or to the public generally, that they are not responsible for the acts of one or more of the other partners. Such repudiation of the ordinary liabilities of a partner, especially if it be with reference to a single transaction, is not, perhaps, necessarily inconsistent with the continuance of the partnership. But it more commonly happens when one or more of the partners wishes to dissolve the partnership and retire, while the rest choose to continue in the business. Such warnings by partners of limitations they mean to put to their own liability, and to the authority of the other partners, have the same effect, so far as third persons are concerned, as the communication of stipulations between partners restricting their liability, and upon similar principles. For, a partnership being once proved to exist, and the implied power of each partner to act for the others in every thing within the scope of the partnership business being once given, the fair presumption upon which third parties are justified in acting is, that the partnership and the consequent implied authority of each partner still continue. But this presumption is of course wholly rebutted by notice to the contrary, and can then no longer be a reason for holding the party giving the notice to liability as a partner. In Galway *v.* Matthew & Smithson, 10 East, 264, the defendants, partners in trade, were sued upon a promissory note. Matthew let judgment go by default; but Smithson defended the action on the ground that the plaintiff, before he took the note in question, had notice of an advertisement, then recently published in a newspaper by Smithson, wherein he warned all persons not to give credit to the defendant Matthew on his (Smithson's) account, and that he would no longer be liable for drafts drawn by the other partners on the partnership account. The defendants having a verdict on this ground (Galway *v.* Matthew, 1 Camp. 403), upon motion to set aside the nonsuit, Lord Ellenborough, C. J., said: "The general authority of one partner to draw bills or promissory notes to charge another, is only an implied authority; and that implication was rebutted in this instance by the notice given by Smithson, who is now sought to be charged, which reached the plaintiff, warning him that Matthew had

tion of authority on the part of his partner, to bind, seems to be a question of fact. (*w*)

no such authority. It is not essential to a partnership that one partner should have power to draw bills and notes in the partnership firm to charge the others: they may stipulate between themselves that it shall not be done; and if a third person, having notice of this, will take such a security from one of the partners, he shall not sue the others upon it, in breach of such stipulation, nor in defiance of a notice, previously given to him by one of them, that he will not be liable for any bill or note signed by the others." Layfield's Case, 1 Salk. 292; Minnit *v.* Whinnery, 2 Bro. P. C. 323; 16 Vin. Abr. 244; *Ex parte* Harris, 1 Madd 583; Vice *v.* Fleming, 1 Y. & J. 227; Rooth *v.* Quinn, 7 Price, 193; Feigley *v.* Sponeberger, 5 Watts & S. 564; Johnston *v.* Dutton, 27 Ala. 245. It has, however, been questioned, whether, if a firm consist of more than two members, the expressed and known dissent of one partner to a contract about to be entered into in good faith by a majority of the partners in the name of the firm will operate to free the dissenting partner from liability thereon. Story on Part. § 123, and notes; 3 Kent Com. 45. This question will be considered when we come to treat of the power of a majority of the partners to bind the partnership, *post*, ch. 7, § 5. In one case, indeed, it was said: "By the act of entering into a copartnership, each of its members becomes clothed with full power to make any and every contract within the scope and limits of the copartnership business. All such contracts will therefore be absolutely binding upon the several members. This power is incident to the copartnership relation, and must exist, in defiance of expostulations and objections, while the relation endures." Wilkins *v.* Pearce, 5 Denio, 541, 544. But, though the judgment in this case was affirmed in the Court of Appeals, the *dictum* just quoted does not appear to have been approved. On the other hand, the acts of the protesting partner subsequent to his expression of dissent were held to amount to a waiver of it, and to a ratification of the transactions to which he had originally objected. s. c. 2 Comst. 469, 472. See opinion of Colden, Senator, in Smith *v.* Lasher, 5 Cow. 689, 710. In Willis *v.* Dyson, 1 Stark. 164, Lord Ellenborough *held*, "that after notice by one partner not to supply any more goods on the partnership account, it would be necessary for the party sending goods after such notice to prove some act of adoption by the partner who gave the notice, *or that he had derived some benefit from the goods.*" This qualification of the rule, that a partner may limit his liability by giving notice to that effect, though reiterated upon the authority of this case by some of the writers on partnership (see 3 Kent Com. 8th ed. 49; Gow on Part. 52), seems open to considerable question, as matter of principle. Nor does it appear to have the support of any other judicial decision. On the contrary, in Galway *v.* Smithson, *supra*, Matthew, for whose acts Smithson, his partner, had given the plaintiff notice he would not be responsible, had, after the notice, borrowed money of

(*w*) Leavitt *v.* Peck, 3 Conn. 124; Willis *v.* Dyson, 1 Stark. 164; Vice *v.* Fleming, 1 Y. & J. 227. See authorities cited above. And if a partner, in the presence of a party dealing with another partner who acts in the name of the firm, refuses to be bound by the transaction, yet his subsequent acts and declarations may amount to a waiver of his dissent, and to a ratification of the transaction from which he thus at first dissented. Pearce *v.* Wilkins, 2 Comst. 469.

* On the whole, we say that the law-merchant, as it is * 98
incorporated into the common law of England and of this country, does not permit one to secure to himself all the advantages and gains of partnership, and guard himself against all its liabilities and losses; and that his attempt to do so would be defeated by casting upon him those liabilities. But stipulations are often entered into which must be understood as giving up, on the part of all the partners, or of a part, some of the powers and advantages of partnership, and providing against a proportionate measure of liability; and any stipulations of this character would undoubtedly take effect as far as they were known.

Thus, it is quite common, in continental Europe, for mercantile firms, in their circulars or other advertisements, to designate one or more of the partners as alone having authority to put the name of the firm to negotiable paper. If a firm should so advertise in this country, it would undoubtedly prevent any person who knew of it from holding the firm on the signature of any other member. But it should not affect one who did not know it; because he might fairly imply the authority of each partner from the partnership. * Formerly, the * 99
phrases special and limited partnerships, which now have a statute meaning, were applied quite loosely to those which were less general than usual; (*x*) and it was always

the plaintiff, and had applied it mostly to the payment of partnership debts. Nevertheless, Smithson was held not liable on a note given in the partnership name for the sum so borrowed. So in Leavitt *v.* Peck, 3 Conn. 124. In Monroe *v.* Conner, 15 Me. 178, Shepley, J., after an examination of the point, comes to the conclusion, that "it is more in accordance with the general principles of law, and with good faith and fair dealing, to hold that a partner is not bound by a contract after he has given notice, to the party proposing to make it, that he would not be bound by it." When notice is given to a party proposing to make a certain contract, that one member of a firm will not be bound by the action of the other members, if the party thus notified still persists in his purpose, and completes the contract, he must be presumed to have made it solely on the credit of the non-dissenting partners. But we shall see, in the next section, that where credit is given to one or more of the individual partners, the other partners are not liable on such contracts, even though they inure to the benefit of the partnership.

(*x*) See Lansing *v.* Ten Eyck, 2 Johns. 304; Mumford *v.* Nicoll, 20 id. 624, 629; Bentley *v.* White, 3 B. Mon. 263; Reynolds *v.* Cleaveland, 4 Cow. 282; Ensign *v.* Wands, 1 Johns. Cas. 171. In these last two cases, the word "limited" is used only in the head-note. Ensign *v.* Wands, 1 Johns. Cas. 171; De Berkom *v.* Smith, 1 Esp.

held that, where these limitations were known to a customer, he was affected by them; and further, that this specialty or limitation may be inferred from facts. Limitations upon the authority of one partner to represent his copartners may also be imposed by the nature and usages of particular trades. The fact that a partnership is engaged in a particular trade being known, is sufficient notice to third persons of the limitations which the nature and customs of that trade place upon the power of each partner; and third parties dealing with a partner in matters outside the scope of its usual business, to charge his firm therein, must show him to have possessed special authority so to act. Thus, it has been *held*, that persons who are engaged in working a mine or a farm, in partnership, give no implied authority to one another to borrow money or to draw bills of exchange on joint account and credit, even in promotion of the joint business. Hence, if money be borrowed, or a bill be drawn, by one of several persons jointly interested in a farm or a mine, the lender or holder cannot hold the other partners upon it, without showing that they had in some way authorized the acting partner so to bind them. (*y*)

29; Post *v.* Kimberly, 9 Johns. 489. [When, by the terms of a partnership, the liability of each partner is limited, and this limitation is known to a third person who contracts with a partner in a matter for which he alone is responsible, the other partners are not liable. Thus, A. and B. are partners, A. agreeing to furnish capital, and B. labor; and C. knowing these facts contracts with B. to perform in part the labor which B. was to furnish. C. must look to B. for his compensation. Pollock *v.* Williams, 42 Miss. 88; Newman *v.* Baker, 9 Johns. 207; Zettee *v.* Soper, Sup. Ct. Kan., 4 Cen. L. J. 288. The rights of third persons against a partnership will be limited by the special provisions of the articles of copartnership known to such third persons. Smith *v.* Vanderburg, 46 Ill. 34.]

(*y*) Dickinson *v.* Valpy, 10 B. & C. 128; [Judge *v.* Braswell, Ct. of App. Ky. 3 L. & Eq. Reptr. 602; Kimbro *v.* Bullitt, 22 How. (U. S.) 256; Ulery *v.* Ginrick, 57 Ill. 531;] Greenslade *v.* Dower, 7 id. 635; Ricketts *v.* Bennett, 4 C. B. 686. See Shicknesse *v.* Bromilow, 2 Cromp. & J. 425; Hawtayne *v.* Bourne, 7 M. & W. 595; Tredwen *v.* Bourne, 6 id. 461; Howken *v.* Bourned, 8 id. 703; Burmester *v.* Norris, 6 Exch. 796; 8 Eng. L. & Eq. 487. But where it was shown that it was the custom of planters generally to borrow money when necessary for the purposes of their business, it was *held*, that one of a firm engaged in the business of planting might bind his copartners by borrowing money for their business, and giving a note therefor. Lea *v.* Gnice, 13 S. & M. 656. And in McGregor *v.* Cleaveland, 5 Wend. 475, a promissory note given for the firm by one of two partners in the business of *farming and coopering* was held good, and binding upon both. "An attorney, *quâ* attorney, is not a scrivener: it is part of his business to prepare conveyances and negotiate mortgages, and see that

*A limitation or exception may grow out of the nature of the particular transaction. Thus, if a partner *100

the deeds are executed and the transaction completed. A scrivener is a person who receives money to lay out upon security, and to hold the money in his hands until an opportunity offers for laying it out." Hence, where two are in partnership merely as attorneys, one member of the firm is not rendered liable as partner by his copartner's receiving money indefinitely for the purpose of being laid out on mortgage security. Harman *v.* Johnson, 2 Ellis & B. 188, 18 Eng. L. & Eq. 400, 2 Ellis & B. 61. See Sims *v.* Brutton, 1 id. 446; Wilkinson *v.* Candlish, 19 Law J. Rep. Exch. 166. So, if persons are in partnership as attorneys, there is no implied authority in one of them to bind the rest by pledging the name of the firm for a loan of money, Breckenridge *v.* Shrieve, 4 Dana, 375; Hedley *v.* Bainbridge, 3 Q. B. 316; or by putting the name of the firm in any shape to negotiable paper, Levy *v.* Pyne, 1 C. & Marshm. 453. See Smith *v.* Coleman, 7 Jur. 1053; Wells *v.* Turner, 16 Ind. 133. [Garland *v.* Jacomb, L. R. 8 Ex. 218. In Wisconsin, after a careful review of the authorities, it was *held* that one member of a non-trading partnership — law firm, for instance — cannot bind his copartner by a bill or note, drawn, accepted, or indorsed by him, even for a debt of the firm, unless specially authorized by his copartner, or it be necessary to carry on the partnership, or it be shown to be usual in similar partnerships; and the burden of proof of authority, necessity, and usage is upon the party claiming under the note. Smith *v.* Sloan, 37 Wis. 285; Hunt *v.* Chapin, 6 Lansing (N. Y.), 139; McCord *v.* Field, 27 U. C. C. P. 391; Prince *v.* Crawford, 50 Miss. 344.] In like manner, a partner in the practice of physic is not bound by a note drawn by his copartner in the name of the firm, for the purpose of raising money, Crosthwait *v.* Ross, 1 Humph. 23; nor by any other of his copartner's contracts which are not connected with their business as physicians, Thompson *v.* Howard, 2 Cart. (Ind.) 245. So if four are interested as partners in two shares of the stock of a company formed for digging tunnels, the peculiar and limited character of the partnership business precludes any legal implication that one of the partners can bind the others by issuing commercial paper in the partnership name. Gray *v.* Ward, 18 Ill. 32. See Cocke *v.* Branch Bank, 3 Ala. 175, respecting the limitations to the authority of one of a firm of tavern-keepers. *In re* Worcester Corn Exchange Company, 3 De G., M. & G. 180, 19 Eng. L. & Eq. 632; and Cheeny *v.* Clark, 3 Vt. 431, as to the liability of members of a building association. See also Williams *v.* Thomas, 6 Esp. 18; Bentley *v.* White, 3 B. Mon. 263; Vance *v.* Campbell, 8 Humph. 524; Lanier *v.* McCabe, 2 Fla. 32; Miller *v.* Hines, 15 Ga. 197; Benson *v.* M'Bee, 2 McMullan, 91; Goodman *v.* White, 25 Miss. 163; Cargill *v.* Corby, 15 Miss. 425; Lansing *v.* Gaine, 2 Johns. 300. In Andrews *v.* Lehott, 10 Barr, 47, Andrews & Harris had agreed to form a statutory limited partnership, Harris being the special partner. With that view, they had placed upon record, and otherwise published to the world, in accordance with the provisions of the statute, the terms of their connection. A subsequent breach of the statute made Harris a general partner, in an action against both the partners upon contracts made in the name of the copartnership. Harris alleged in defence that the plaintiff, at the time the contracts were made, knew he was a special partner, and gave credit to the firm and the general partners, and did not rely on him. But it was *held*, that this knowledge by the creditor of the special partnership could not discharge the special partner from the general liability fixed on him by statute. The court said: "If the plaintiffs knew they held themselves out as a limited partnership, they also knew that, if

of a firm which deals only in merchandise gives the note of the firm for a horse, it would be a fair presumption that the party receiving it — if he knew the general business of the firm — should have supposed that the partner had no authority
* 101 to give such a note. (z) The rule itself, which gives * to a partner his authority, limits it, in perhaps all the authorities which assert the rule, to contracts or acts within or belonging to the business of the firm. The reason of this is perfectly obvious; and it would follow that as partners may certainly limit their business as they please, by so doing they place an analogous limitation to the authority of the partners, in reference to any one knowing the limitation of their business.

The general reason why all the partners are bound by the acts of one, is, that great and inevitable frauds would spring from the want of this rule. Thus, it would always be easy for a firm doing the largest business to have one partner

the defendants failed to comply with the requisition of the act, they became general partners, and were liable as such. The presumption is, that the contract was made in reference to the legal rights of the parties; and this presumption can alone be rebutted by clear proof of an express contract, waiving all the plaintiffs' rights under the statute."

(z) Holmes *v.* Burton, 9 Vt. 252; Livingston *v.* Roosevelt, 4 id. 251. In this last case, A. & B. formed a copartnership, under the style of A. & Co., in the business of sugar-refining, and so advertised the public. B. afterwards, without the knowledge of A., bought a quantity of brandy, for which he gave his note, payable to the firm, and indorsed by him with the name of the firm. The plaintiff, the indorsee of said note, took both the newspapers in which the character of the business of A. & Co. was advertised. The question in the case being whether the copartnership was liable on the above note, Kent, C. J., said: "All partnerships are more or less limited. There is no one that embraces, at the same time, every branch of business; and when a person deals with one of the partners in a matter not within the scope of the partnership, the intendment of law will be, that he deals with him on his private account, notwithstanding the partner may give the partnership name, unless there be some circumstances in the case to destroy that presumption. 'If,' says Lord Eldon (8 Vesey, p. 544), 'under the circumstances, the person taking the paper can be considered as being advertised, that it was not intended to be a partnership proceeding, the partnership is not bound.' Public notice of the object of a copartnership, the declared and habitual business carried on, the store, the counting-house, the sign, &c., are the usual and regular *indicia* by which the nature and extent of a partnership are to be ascertained. When the business of a partnership is thus defined and publicly declared, and the company do not depart from that particular business, nor appear to the world in any other light than the one thus exhibited, one of the partners cannot make a valid partnership engagement on any other than a partnership account. There must be some authority, beyond the mere circumstance of partnership, to make such a contract binding."

(entitled to a very small share) without means, and therefore without risk, who should sign all their paper and execute all their contracts; the other partners taking all the profits and casting all the losses on him. But it would as certainly be a fraud, if a customer, who knew that a partner with whom he dealt had no authority to act for his partners in a certain way or on certain terms, should nevertheless make that very bargain with him, relying on the responsibility of the other partners. (*a*) A firm may undoubtedly permit one of the partners to act in his own name, but for the interest and benefit of the firm, and then any loss in such transaction is a loss of the firm. As where one partner deposited the funds of the firm in a bank in his own name, with the consent and for the convenience of the firm, and the funds were charged to him in the books of the firm, but only to indicate in whose hands they were, and the bank became insolvent, — it was held to be the loss of the firm, and not of the partner. (*aa*)

* While there are many cases in which this general * 102
question is raised, there are few in which it is fully considered. In nearly all, it is dismissed with the simple remark, that any stipulations which partners choose to agree upon between themselves are operative and obligatory upon any third parties to whom they are made known. But, for the reasons we have already given, we think this statement of the rule too broad. It needs to be qualified by the other rule, that the limitations and qualifications shall produce or leave

(*a*) To a similar effect is the language of Kent, C. J., in Livingston *v.* Roosevelt, 4 Johns. 278, 279. He says that where the particular business of a firm is made known in a usual and reasonable way to the public, "the creditor is *advertised* that he is not dealing on a partnership account; and for him to take a partnership engagement, without the consent of the firm, is, in judgment of law, a fraud upon the firm. Suppose, in the case of a general commercial partnership, a debt was to be contracted by one partner upon the purchase of new lands; or suppose, in the case of a partnership between two attorneys, in law business, a partnership note was to be given by one of them upon the purchase of groceries or furniture for his family, — it could not be supposed by any one that the company would be holden. These would be plain cases of a fraud, practised upon the firm, of which the creditor would be chargeable with notice. When the public have the usual means of knowledge given them, and no means have been suffered by the partnership to mislead them, every man is to be presumed to know the extent of the partnership with whose member he deals." Dow *v.* Sayward, 12 N. H. 275. See Bignold *v.* Waterhouse, 1 Moore & S. 259; Maltby *v.* N. W. & R. Co., 16 Md. 422.

(*aa*) Campbell *v.* Stewart, 34 Ill. 151.

something of equality between the general advantages which are to be gained by the partnership on the one hand, and the power and authority of the partner or partners on the other; or in other cases, similar to those we have already used, the law will not permit parties to enter into an actual and unlimited partnership, so far as regards all the advantageous results to be derived from a partnership, and then by an agreement among themselves, communicated to others, to protect themselves from any important portion of the liabilities which necessarily belong to partnership by the law, the usage of merchants, and reason and justice.

We have already seen that any stipulations between partners bind them, and there is nothing to prevent them from agreeing that one shall share all the profits, but that the others shall bear all the losses. This, however, will not prevent a creditor of the firm from suing all, nor from levying an execution on the property of the partner thus exempted, unless the creditor had knowledge of the agreement, and made his bargain with the firm so far in acceptance of and accordance with that agreement, that he must be taken not to have given any credit to the exempted partner. If that partner is made to pay any share of loss, by the general law of partnership, he can turn round upon his partners, under their agreement, and recover it from them.

*103 *It is well established that if a partner, in direct violation of his stipulations as partner, or in fraud of the partnership, enters into any contract on their part with a third person, the partners are not discharged by his breach of contract, or by his fraud, unless the third person was participant or conusant of it. (*b*)

(*b*) See *post*, ch. 7, "Of the Rights and Duties of Partners between Themselves." And see Salland *v.* McRae, 16 La Ann. 193; Stockwell *v.* Dillingham, 50 Me. 442. Mechanics' Bank *v.* Foster, 44 Barb. 87; Gale *v.* Miller, id. 420; Tilford *v.* Ramsey, 37 Mo. 563; Hayward *v.* French, 12 Gray, 453; Sterling *v.* Jandon, 48 Barb. 459; [Blodgett *v.* Weed, 119 Miss. 215. See also Guild *v.* Welch, 119 Mass. 257. A partner cannot, for a private consideration, discharge a debtor of the firm, by an agreement to pay the debtor's note to the firm. Lewis *v.* Westner, 29 Mich. 14. If a partner pays his private debts by receipting a bill due from his creditor to the firm, the firm, or its assignee, may nevertheless recover the amount of their bill. Thomas *v.* Penrich, Sup. Ct. Cin. Ohio, 3 L. & Eq. Reptr. 399. If the

We add, that the person so dealing with a fraudulent partner, in actual ignorance of the fraud, but in an ignorance which implies gross negligence on his part, should not be permitted to hold the firm. This would be an inference from the principles of agency. This rule has been applied to the holder of negotiable paper, and should be applied to every one dealing with such partner. (*c*)

SECTION IV.

WHEN CREDIT IS GIVEN TO ONE PARTNER ONLY.

He who gives credit to one partner alone, cannot call on the rest. This is true, however the credit be given. As, if the *creditor sold him goods; (*d*) or sold to another *104

appropriation by one partner of partnership property to pay his private debt, be made and received in good faith and under such circumstances that the other partners and the creditors are not defrauded, the money so appropriated cannot be recovered back. Corwin *v.* Suydam, 24 Ohio St. 210.]

(*c*) Loyd *v.* Freshfield, 2 C. & P. 325; New York Fire Insurance Co. *v.* Bennett, 5 Conn. 574. In this last case, Hosmer, C. J., says: "It is now insisted, that the payee of a promissory note, although he has knowledge that the maker or indorser in the name of the firm is making payment by this act of his own debt, or is becoming the surety of another person, without the concurrence of his partners, and that neither the partnership covenant nor the interest of the partnership sanctions the act, yet that he has a right to subject the partnership. The principle, in direct hostility with justice and convenience, is endeavored to be sustained by the unwarranted supposition, that the payee, not having knowledge that special authority was not given the partner, may fold his arms, and reap a benefit from his supineness. Common sense and common integrity require that he should make inquiry, in such cases, and actually know that authority was given. He is bound, on legal and fair principles, to sustain the affirmative. He knows that the partnership is for mercantile operations. He knows that the partner, signing or indorsing a note in the name of the firm, from the partnership contract, had no implied authority. He knows that the act can alone be authorized by the delegation of express power. And he knows that on the most common and best-established principles, in promotion of justice and prevention of fraud, the person claiming the obligation of contract against a partnership is bound to prove it." See Warren *v.* French, 6 Allen, 317; Kimball *v.* Walker, 30 Ill. 482; Duncan *v.* Lewis, 1 Duvall (Ky.), 183; Sims *v.* Smith, 12 Rich. Law (S. C.), 685. [Whether the plaintiff suing on such a note had such notice as ought to put him on inquiry, is a question for the jury. Waite *v.* Thayer, 118 Mass. 473. The burden of proof that a note given in the firm name by one of the partners is not on partnership account, is on the partnership. Currier *v.* Cameron, 31 Mich. 373.]

(*d*) As where goods for the use of a stage-coach are supplied to one of several partners in a stage-coach line by one knowing that the agreement between them is that each shall run and stock a particular portion of the road at his own expense. Iliard *v.* Bigg, Mann. N. P. Index, Partners, A. (*a*), 5; Barton *v.* Hanson, 2 Camp. 97; 2 Taunt. 49. So where L. & C.,

goods on his guaranty; or received him as surety in any way, or loaned him money. (*e*) If there is no evidence to show to whom credit was given, the fact that money borrowed by a partner comes to the use of a firm raises a presumption that the
*105 loan was made by him *as partner, and, if not rebutted, will make the firm liable for the repayment. (*f*)

by articles, entered into partnership for the manufacture of hemp; L. to find the stock, and C. to furnish the machinery and operatives. The plaintiff's slave was employed, by C. alone, in the business of the firm, and the present action was assumpsit against the partners for the value of his services. The plaintiff, as the only evidence of the liability of the firm, exhibited the articles of copartnership, providing for the arrangement above stated. *Held*, that, in the absence of evidence to the contrary, the plaintiff must be presumed cognizant of the duty of C. to furnish hands, and to have contracted solely upon the credit of C.; to whom alone, therefore, he could look for payment. Lafon *v.* Chinn, 6 B. Mon. 305. See Pinckney *v.* Keyler, 4 E. D. Smith, 469. In Young *v.* Hunter, 4 Taunt. 583, Gibbs, J., said: "I am by no means of opinion that there may not be a case where two houses shall be interested in goods from the beginning of the purchase, yet not be both liable to the vendor: as if the parties agree amongst themselves that one house shall purchase the goods and let the other into an interest in them, that other being unknown to the vendor; in such a case the vendor could not recover against him, although such other person would have the benefit of the goods. See further Saville *v.* Robertson, 4 T. R. 725; Gibson *v.* Lupton, 9 Bing. 297; *Ex parte* Harris, 1 Madd. 583; Holcroft *v.* Hoggins, 2 M., G. & Sc. 488; Sylvester *v.* Smith, 9 Mass. 121; Holmes *v.* Burton, 9 Vt. 252; Ketchum *v.* Durkee, 1 Hoff. Ch. 528; Watt *v.* Kirby, 15 Ill. 200; Meyer *v.* Larkin, 3 Cal. 403. In Johnston *v.* Warden, 3 Watts, 101, the court instructed the jury: "That if A. contract with B. to deliver articles at a specified period, and if in the intermediate time B. & C. enter into a partnership, as upon such a contract, it is to be presumed that payment is to accompany delivery; if credit is given at the time of delivery, it must be presumed to be done upon the credit of the partners, and this whether the existence of the partnership was known to the plaintiff who gave the credit or not. If the existence of the partnership was known at the time, no doubt could be raised; but if a credit be given where there is a secret partner, as the credit is supposed to be given as well to him as to those associated with him, upon the ground that he is entitled to the profits, so he in equity should be responsible for the loss in the present case."

(*e*) *Ex parte* Hunter, 1 Atk. 223; Parkin *v.* Carruthers, 3 Esp. 248, per Le Blanc, J.; Loyd *v.* Freshfield, 2 C. & P. 325; Bevan *v.* Lewis, 1 Sims, 376; Murray *v.* Somerville, 2 Camp. 99; Le Roy *v.* Johnson, 2 Peters, 186; Mifflin *v.* Smith, 17 S. & R. 169; Willis *v.* Hill, 2 Dev. & Bat. 231; Foley *v.* Robards, 3 Ired. 177; Bird *v.* Lanius, 4 Wis. 615; Clay *v.* Cottrell, 18 Penn. 408; Wiggins *v.* Hammond, 1 Mo. 121; Siegel *v.* Chidsey, 28 id. 279; Miller *v.* Morrice, 6 Hill, 114; Holmes *v.* Burton, 9 Vt. 252; Evans *v.* Biddleman, 3 Cal. 435; Logan *v.* Bond, 13 Ga. 192; Foster *v.* Hall, 4 Humph. 346; Jaques *v.* Marquand, 6 Cow. 497; Whitaker *v.* Brown, 16 Wend. 505.

(*f*) Jaques *v.* Marquand, 6 Cow. 497; Rothwell *v.* Humphreys, 1 Esp. 406; Church *v.* Sparrow, 5 Wend. 223; Whitaker *v.* Brown, 16 id. 505. If for money borrowed a partner gives his

If the creditor sold goods or loaned money to every one of the partners severally, on their several credit, he could not recover of them jointly, nor hold them mutually responsible, although the money or the goods were immediately used by the borrowers or buyers to make up the stock of the firm, or provide for its debts or business. (*g*)

It must, however, be remembered, that this credit, to exonerate the other partners, must be given knowingly and voluntarily. For, if one sold goods actually to a firm, but through the agency of a partner whom he did not know to be a partner, and accordingly charged the same to that partner alone, the firm would still be bound. We think this rule applies equally to all simple contracts, whether oral or written. (*h*)

own bill, or note, or other simple contract security, and suit is brought *directly upon* such individual security, "it cannot be allowed to supply by intendment the names of others, in order to charge them" (per Lord Ellenborough, C. J., in Emly *v.* Lye, 15 East, 7); Skiffkin *v.* Walker, 2 Camp. 308; *Ex parte* Brown, 1 Atk. 225, cited; *Ex parte* Bolitho, Buck, 103; though upon the common money counts the partnership may be charged, if the obligation of the borrowing partner was meant to be taken, not in lieu of, but simply in connection with, the partnership liability. Ibid.; Denton *v.* Rodie, 3 Camp. 493; Tucker *v.* Peaslee, 36 N. H. 167. If, however, the obligation of one partner be thus taken, not as a collateral, but as the sole security for the money loaned, the credit must be deemed to have been given solely to that partner, and the lender cannot recover for money had and received by the partnership, notwithstanding the loan went to its use. As where the transaction between a banker and one partner is in fact a discount by the former of the latter's paper; notwithstanding the application of the funds so raised to the uses of the firm, and the understanding by the banker that they would be so applied, the discounter does not become a creditor of the partnership, but simply of the contracting partner; for "the purchase or discount of a note is a contract wholly unconnected with the objects, uses, or application of the money paid." Per Baldwin, J., in Winship *v.* Bank of the United States, 5 Peters, 567; Emly *v.* Lye, 15 East, 7; Denton *v.* Rodie, 3 Camp. 493; Graeff *v.* Hitchman, 5 Watts, 454; Bond *v.* Aitkin, 6 Watts & S. 165; Foster *v.* Hall, 4 Humph. 346; Union Bank *v.* Eaton, 5 id. 499; Green *v.* Tanner, 8 Metc. 411; Ostrom *v.* Jacobs, 9 Metc. 454; Thom *v.* Smith, 21 Wend. 365; Beebe *v.* Rogers, 3 G. Greene, 319; Mead *v.* Tomlinson, 1 Day, 148. See also Donnally *v.* Ryan, 41 Penn. 306; Folk *v.* Wilson, 21 Md. 538.

(*g*) Saville *v.* Robertson, 4 T. R. 725. See Hoare *v.* Dawes, Dougl. 371; Coope *v.* Eyre, 1 H. Bl. 37; Smith *v.* Craven, 1 Cromp. & J. 500; Bevan *v.* Louis, 1 Sims. 376; Wall's Adm. *v.* Fife, 37 Penn. 394. [So where two parties agree to buy separately certain amounts of a specified kind of property, and then to form a partnership, each contributing his purchase to the firm, neither partner is liable for the purchase of the other, as for a partnership debt. McGar *v.* Drake, Sup. Ct. Tenn., 5 Reptr. 387.]

(*h*) It was *held*, in one case, in the Common Pleas in England, that there was a difference between a written and an oral contract, so far as regards the liability of a dormant partner to be

*106 *The firm would not be held, if the creditor of the firm had accepted the individual security of the partner instead of the debt of the firm; provided the new individual

sued thereon, and that, in an action upon the former, it was not allowable to add as parties other persons than those whose names were signed to the agreement. Beckham *v.* Knight, 4 Bing. N. C. 243. The facts of the case are sufficiently set forth in the opinions of the judges. Tindall, C. J.: "The action is brought on an express contract between Knight & Surgey of the one part, and the plaintiff of the other part. It appears by the plea that three persons were carrying on business under the firm of Knight & Surgey, and that the defendant Drake was a dormant partner. The agreement is in writing *inter partes;* and it contains no intimation that Knight & Surgey were carrying on business as members of a more extensive firm. I know of no authority for introducing the name of a dormant partner into such a contract. In implied contracts, where the benefit is equal, and the liability not limited, a dormant partner may be included; but there is no authority which extends the principle to express contracts." Bosanquet, J.: "The plaintiff is precluded, by the form of the contract, from saying that any other person entered into it besides himself and Knight & Surgey." See also Robinson *v.* Rudkins, Exch. 38 Eng. L. & Eq. 372. But Beckham *v.* Knight, *supra*, was afterwards overruled in the Exchequer. In Beckham *v.* Drake, 9 M. & W. 79, upon the same state of facts, Lord Abinger, C. B., said: "I am of the same opinion that I was then, that the doctrine stated by the Court of Common Pleas, that, when a contract is in writing between parties signing their names to it, it cannot be used against other parties than those who signed their names to it, — cannot be supported either on principle or authority. That position, indeed, is contradicted by the whole series of authorities bearing on the subject. There is no question that a contract in writing by an agent, signed by himself, will bind his principal, when the other contracting party discovers the principal, although the contract was made without his knowing who the principal is; as, for instance, in the case of a bill of lading signed by the master, where the action is brought against the owners. It is also the case of every charter-party, which is signed by the owner, where the owner is rendered liable by the act of the master, because the master is his agent. So it is in a vast variety of other cases which frequently occur, all establishing the principle, that the parties really contracting are the parties to sue in a court of justice, although the contract be in the name of another. . . . A contract under seal can bind none but those who sign and seal it. A contract not under seal is open to all the common-law requirements and incidents of a contract, whether in writing or not. Suppose these two partners, Knight & Surgey, had made a contract verbally, not having said a word about Drake; no question could then have arisen that Drake might nevertheless be liable upon it. How, then, does the fact of its being in writing, and of their having put their names to it, alter the case? The parties are just in the same situation, and there can be no difference. There is nothing affirmative on the face of the contract to show an intention to exclude everybody but themselves. It is open to the defendant Drake to show such an intention, but, unless it be shown, the objection does not arise." See Cooke *v.* Seeley, 2 Exch. 746. See, to the same effect, Snead *v.* Baringer, 1 Stew. 134; Reynolds *v.* Cleaveland, 4 Cow. 282; Mead *v.* Tomlinson, 1 Day, 148. The question as to whom the credit was given is one for the jury. Webster *v.* Stearns, 44 N. H. 498.

indebtedness be of a higher nature than the firm debt, or payable sooner, or attended with some other advantage, which might be regarded as a * consideration. (*i*) And *107

(*i*) As where the bond or other specialty of one partner is taken for the simple contract debt of the partnership, see Williams *v.* Hodgson, 2 Harris & J. 474; Tom *v.* Goodrich, 2 Johns. 214; Clement *v.* Brush, 3 Johns. Cas. 180; Waugh *v.* Carriger, 1 Yerg. 31; Ward *v.* Motter, 2 Rob. (Va.) 536; Moule *v.* Hollins, 11 Gill & J. 11; Jacobs *v.* McBee, 2 McMullan, 348; Bell *v.* Banks, 3 Man. & G. 258; Ward *v.* Johnson, 13 Mass. 150; Patterson *v.* Brewster, 4 Edw. Ch. 352; McNaughten *v.* Partridge, 11 Ohio, 223. In United States *v.* Astley, 3 Wash. C. C. 512, Washington, J., said: "The reason upon which the doctrine is founded is obvious. The bond is clearly obligatory upon the parties who executed it, and is therefore an extinguishment of the simple contract debt as to him. A joint action, therefore, to recover on the original debt could not be supported against both partners. Neither could an action be maintained against the partner who did not execute the bond, because he has a right to insist that his partner should be joined with him in the action; of which right the creditor and the other partner cannot, without his consent, deprive him. It is precisely like the case of a release, which, if given to one joint debtor, discharges both. A bond given for a simple contract debt operates as a release of that debt, and creates another of a superior dignity, which can be enforced only against the person who executed the bond."

The above reasoning seems conclusive, and appears to place the doctrine in question upon a foundation entirely independent of the intentions of the parties. A different principle, however, is intimated in some of the authorities. Thus, in United States *v.* Lyman, 1 Mason, 505, 506, Story, J., says: "The doctrine, that in general a higher security taken from the debtor himself extinguishes the original contract, proceeds upon a presumption of law that it is taken in satisfaction of the original debt; for, if it appear otherwise upon the face of the security, it will not operate as an extinguishment. . . . It is, therefore, after all, a mere question of interest; and the law, in the absence of all other evidence of the interest, construes the higher security of the debtor himself as an extinguishment, because it gives a higher remedy. I admit, also, that a higher security by a third person, if taken at the time of making the original contract or afterwards, in satisfaction of the debt, operates as an extinguishment. But there is this difference between the case of a higher security of the debtor himself and of a third person, that, in the latter case, the law does not presume the security taken in satisfaction, unless it is averred and proved to be the agreement of the parties so to consider it. Whether the receiving of a higher security from one partner for a partnership debt be an extinguishment, unless expressly taken in satisfaction of such debt, may perhaps admit of some doubt, notwithstanding the language of some highly respectable authorities." So in Bond *v.* Aitkin, 6 Watts & S. 165, the language of the court is: "Where the bond of one of the partners is taken for an antecedent partnership debt, it may be considered either as payment and extinguishment of such debt, or only a collateral security, according to the nature of the transaction and the circumstances attending it. Wallace *v.* Fairman (4 Watts, 378). But where there is no antecedent debt, but the bond of one partner is taken at the time money is loaned to the partnership, and as the consideration for loaning the money, it can hardly be treated as a collateral security. It must be considered as all one transaction, and the bond as the only security contemplated; *unless*, perhaps, there were strong and positive evidence to show an express agreement to the contrary by all parties." See

* 108 a judgment obtained against one partner, whether * the others be ostensible or secret, discharges the firm from liability to be sued for the same debt. (*l*)

Collier *v.* Leech, 29 Penn. St. 404. And where two partners agreed to borrow money for partnership purposes, and, upon its being loaned to them, one of them gave his sole bond for the amount, with the other as a witness, it was *held*, upon the insolvency of the firm, that the obligee might be admitted as creditor under a joint commission. *Ex parte* Brown, 1 Atk. 225, cited. See Horton *v.* Child, 4 Dev. 460; Ross *v.* Lawhorn, Dudley, 360; Doniphan *v.* Gill, 1 B. Mon. 199. See Despatch Line of Packets *v.* Bellamy Man. Co., 12 N. H. 234. But the ground upon which the rule is placed in the passage above quoted from Washington, J., certainly seems to be more consonant with the weight of the authorities. In Clement *v.* Brush, 3 Johns. Cas. 180, the understanding of the parties that the partnership was not to be released was evinced on the face of the specialty, which was taken by the creditor for the firm debt, by its being signed by the partner with the name of the firm. But the court said: "One partner cannot bind his copartner by seal. The defendant Brush, who executed it, is alone bound by the specialty; and, it being a debt of a higher nature, it extinguishes the simple contract or partnership debt." So in Williams *v.* Hodgson, 2 Harris & J. 474, and in McNaughten *v.* Partridge, 11 Ohio, 223.

(*l*) King *v.* Hoare, 13 M. & W. 494; Maule, J., in Bell *v.* Banks, 3 Man. & G. 267; Lechmere *v.* Fletcher, 1 Cromp. & M. 635; Trafton *v.* United States, 3 Story, 648, 651; United States *v.* Cushman, 2 Sumner, 437, 440; Pearce *v.* Kearney, 5 Hill, 82; Suydam *v.* Barber, 6 Duer, 34, 38; McMaster *v.* Vernon, 3 id. 249; Peters *v.* Sandford, 1 Denio, 224. See, however, Collier *v.* Leech, 29 Penn. St. 404. But this is not upon the ground that the creditor who thus obtains judgment against one partner alone thereby agrees, or is on that account presumed to agree, to release the other partners. If that were so, the presumption might be rebutted; as, for instance, in the case of a secret partner, and the firm held, notwithstanding a prior judgment against one partner upon the same cause of action. But the real reason in case of a judgment, as well as of a bond, is, that the creditor, by taking the higher form of a judgment security against one partner for a debt *due jointly from all* the partners, thereby changes the relations and liabilities of the parties under the original contract, and cannot, therefore, afterwards hold them upon it, whatever may be his intention. Perhaps these two views of the effect of a creditor's taking the separate higher security of one partner for a partnership debt arise from a partnership's being regarded in two different lights. If a partnership be treated as a person, entirely distinct from the individual partners, then a contract between a creditor of the firm and one of the partners, by which the former receives from the latter, for a firm debt, his sole obligation of a higher nature, is *res inter alios acta*, and may be said not to discharge the firm, unless clearly proved to have been intended by all the parties to have that effect. If, on the other hand, a partnership be considered simply as so many persons, who contract and are bound jointly, but in no other way, a person who has made a contract with the partnership, but who afterwards in some way absolves one of the partners from liability to be sued upon it together with the other partners, has thereby precluded himself from suing on the original contract, because by his own act he has deprived himself of the proper parties.

We have already seen that a judgment against an ostensible partner, upon a joint claim, though unsatisfied, and obtained during the concealment of the secret partner, is a bar to a subsequent suit upon the same cause of

*If a creditor of a firm has lost his remedy against * 109
the partnership by taking from one partner a security of a higher nature, it may not be quite determined whether equity will give relief; or, if it can, under what circumstances and in what manner this relief will be afforded. Perhaps the question, in each case, would be determined by the intention of the parties; for, if they purposed and desired to extinguish the joint debt and substitute an individual debt, neither equity nor law would keep the joint debt alive. It is *held*, in several cases, that it is no ground for the interposition of equity, that a creditor of a partnership has, in ignorance of a secret partner, extinguished his remedy at law against him by taking, for the debt of the firm, either a judgment against the ostensible partner, or his separate bond or specialty. (*m*) If, however, a partner attempts to bind the partnership by a specialty, but, failing for want of authority, binds himself only, and thereby discharges the partnership at law altogether, — equity will give relief against the other partner, if it be shown that the contract was really on the partnership account, and was intended by all parties to bind the firm. (*n*)

action brought against both the ostensible and the secret partners. Upon the same principles, the bond of an ostensible partner, taken for a partnership debt, extinguishes the claim as against a secret partner, who may be afterwards discovered. See a full discussion of this point in Ward *v.* Motter, 2 Rob. (Va.) 536; also, Anderson *v.* Levan, 1 Watts & S. 334; Spear *v.* Gillet, 1 Dev. Eq. 466.

(*m*) Penny *v.* Martin, 4 Johns. Ch. 566; Willings *v.* Consequa, 1 Pet. C. C. 301; Williams *v.* Hodgson, 2 Har. & Johns. 474; Smith *v.* Black, 9 S. & R. 142; How *v.* Kane, 2 Chand. 222; Ledam *v.* Williams, 4 McLean, 51. See Spear *v.* Gillet, 1 Dev. Eq. 466.

(*n*) Wharton *v.* Woodburn, 4 Dev. & Bat. 507; Blanchard *v.* Parteur, 2 Hayw. 393; James *v.* Bostwick, Wright, 142. Gunter *v.* Williams, 40 Ala. 561. See McKee *v.* Bank of Mt. Pleasant, 7 Ohio, 175. In McNaughten *v.* Partridge, 11 id. 223, one partner executed a bond for a joint debt in the name of his firm, all the parties to this instrument and all the partners supposing, at the time, that the partnership was bound by such execution. It was *held*, that, on the ground of the mistake of the parties as to the legal effect of the execution of the bond, equity might relieve against the firm. But the obligee, having, after the discovery of the mistake, pursued his remedy against the executing partner individually, on the aforesaid bond, it was *held*, that this was a ratification of the arrangement by which the partnership had been discharged, and that equity could not now relieve. The doctrine in Virginia is thus set forth in a late case (Nadnay *v.* Harvey, 9 Gratt. 466) by Daniel, J.: "It may, however, I think, be stated as the well-settled doctrine of this court, that whilst the mere acceptance of such higher security by a creditor from one member of a firm, for a partnership debt due by simple contract, destroys the right of the creditor to proceed at law against the mem-

*110 * If there be no new consideration for the new promise, as all the partners were equally liable *in solido* for the firm debt, the new promise of any one of them to pay it, should, by itself alone, be no consideration for releasing the rest. (*o*) It is, however, the doctrine of some well-considered cases, that it is for the jury to decide whether the creditor intended to accept the sole liability of a partner in discharge of the joint debt of the firm; for if there was such an intention, and no fraud, the new promise would be supported on the ground that the sole promise must have been more beneficial than the joint promise, or it would not have been accepted instead of the joint promise. (*p*)

ber who was not a party in giving such higher security, yet that a court of equity will look at the original character of the debt, and will not withhold relief against the member not uniting in the higher security, merely because of the merger and destruction of the legal remedy against him; but will treat that simple contract as a debt still subsisting *in foro conscientiæ*, unless it is shown that the creditor intended, by accepting such higher security, to abandon all recourse upon his original demand. In other words, that in a court of law the higher security operates *per se* a destruction of the simple contract; but that, in a court of equity, whether such is to be the effect of the transaction, is a question to be decided by proof of the intention of the parties. If by taking such higher security it was not the design of the parties that the social debt should be wholly extinguished, equity will still hold all the partners bound. If, on the other hand, the higher security is given and accepted as a substitute for the original simple contract of the firm, and with the intention to absolve the firm, all remedy upon the latter is gone, in equity as well as at law." See Sale *v.* Dishman, 3 Leigh, 548; Galt *v.* Calland, 7 id. 594; Weaver *v.* Tapscott, 9 id. 424; Ward *v.* Motter, 2 Rob. (Va.) 552; Moser *v.* Libenguth, 1 Rawle, 255; Hart *v.* Withers, 1 Penn. St. 285, 290.

(*o*) Attwood *v.* Banks, 2 Beav. 192; Lodge *v.* Dicas, 3 B. & Ald. 611; Livingston *v.* Radcliff, 6 Barb. 201; David *v.* Ellice, 5 B. & C. 196; Cole *v.* Sackett, 1 Hill, 516; Waydell *v.* Luer, 5 id. 448; Wildes *v.* Fessenden, 4 Metc. 12; Frentress *v.* Marble, 2 Greene (Ia.), 553. See Pierce *v.* Cameron, 7 Rich. 114; Stone *v.* Chamberlin, 20 Ga. 259. [If a creditor of the firm, after dissolution, knowing that one or more of the partners have agreed to assume and pay the firm debts, accepts the note of those agreeing to pay, in payment of his debt, it is a discharge of the other partners. Millerd *v.* Thorn, 56 N. Y. 402. So where each partner gives his note for his share of a debt, it is a discharge of the partnership debt. Maxwell *v.* Day, 45 Ind. 509.]

(*p*) Thus it was said by Denman, C. J., in Thompson *v.* Percival, 5 B. & Ald. 925: "Many cases may be conceived in which the sole liability of one or two debtors may be more beneficial than the joint liability of two, either in respect of the solvency of the parties or the convenience of the remedy, as in cases of bankruptcy, or survivorship, or in various other ways; and whether it was actually more beneficial in each particular case cannot be made the subject of inquiry." Kirwan *v.* Kirwan, 2 Cromp. & M. 617, 623; Hart *v.* Alexander, 2 M. & W. 484; Waydell *v.* Luer, 3 Denio, 410; Livingston *v.* Radcliff, 6 Barb. 301; Van

From the language used in some cases, it might be inferred that the taking of a new security of the same class from one partner for a partnership debt is of itself sufficient to extinguish the partnership debt, and to discharge the firm. But the principle now applied, both in England and generally in this country, is, that the acceptance by a creditor of the firm of one partner's separate security of the same class with the joint security discharges the other partners only when an express or implied * agreement that such shall be the effect * 111 of the transaction is clearly made out. (*q*)

Instances of partners using the name or credit of the firm for their personal advantage, and without authority, are constantly occurring; and, as we have seen, when this is known to the person dealing with them, the firm are not held. Some

Eps *v.* Dillage, id. 244; also, Harris *v.* Lindsay, 4 Wash. C. C. 271; Marshall, C. J., in Shelby *v.* Mandeville, 6 Cranch, 264; *Ex parte* Liddiard, 4 Deacon & Ch. 603; Oakeley *v.* Pasheller, 10 Bligh, 548; Anderson *v.* Henshaw, 2 Day, 272; Thomas *v.* Shillibeer, 1 M. & W. 124. The principle of these latter cases seems also to have been asserted in Evans *v.* Drummond, 4 Esp. 92, and in Reed *v.* White, 5 id. 122. In the former, Lord Kenyon said: "Is it to be endured, that, when partners have given their acceptance, and when perhaps one of two partners has made provision for the bill, the holder shall take the sole bill of the other partner, and yet hold both liable? I am of opinion, that, when the holder chooses to do so, he discharges the other partner." [Acceptance by a firm creditor of a note made by the surviving partner, who had been authorized to take this in liquidation, does not discharge the estate of the deceased partners. Titus *v.* Todd, 25 N. J. Eq. 458.]

(*q*) *Ex parte* Hodgkinson, 19 Ves. 295; Newmarch *v.* Clay, 14 East, 239; Kirwan *v.* Kirwan, 4 Tyrw. 491; 2 C. & M. 617; Harris *v.* Farwell, 15 Eng. L. & Eq. 70, 15 Beav. 31; Winter *v.* Innes, 4 Myl. & Cr. 108, 109; Estate of Davis *v.* Desauque, 5 Whart. 530; Arnold *v.* Camp, 12 Johns. 409; Smith *v.* Rogers, 17 id. 340; Muldon *v.* Whitlock, 1 Cow. 290; Frisbie *v.* Larned, 21 Wend. 450; Waydell *v.* Luer, 3 Denio, 410; Parker *v.* Cousins, 2 Gratt. 372; Mason *v.* Wickersham, 4 Watts & S. 100; Kinsler *v.* Pope, 5 Strobh. 126; Yarnell *v.* Anderson, 14 Mo. 619; Potter *v.* McCoy, 26 Penn. St. 458; Hill *v.* Voorhies, 22 id. 68; Nichols *v.* Cheairs, 4 Sneed, 229. And even in those States, where, as in Maine, Massachusetts, and Vermont, the taking of a negotiable note or bill is regarded as *prima facie* evidence of payment of the debt, it may be believed that the acceptance by a partnership creditor of such separate security would not discharge the firm, unless it were clearly shown that such was the intention of the parties. Barker *v.* Blake, 11 Mass. 20, 21. See also Melledge *v.* B. Iron Co., 5 Cush. 170; Fowler *v.* Ludwig, 34 Me. 455; Tracy *v.* Pearl, 20 Vt. 162; Heald *v.* Warren, 22 id. 410. The security of one or more of the partners for a firm debt is more frequently taken by a creditor where the partnership is dissolved by the retirement of one or more of its members. See ch. 31, § 2, for a more detailed examination of the cases.

difficulty often arises as to the proof of such knowledge on the part of the creditor. There is a rule, however, which rests on strong authority, and is in itself reasonable, just, and convenient, which would settle most of these cases, or at least reduce them to mere questions of fact. It is, that whenever a party receives from any partner, in payment for a debt due from that partner only, whether the debt be created at the time or before existing, or by way of settlement of or security for a debt or indebtedness or obligation of the firm in any form, the presumption of the law is, that the partner gives this and the creditor receives it in fraud of the partnership, and has consequently no demand upon them. (*r*) And upon the
*112 *same principle, if one partner releases a debt due to his firm, in consideration of a release to him of a debt due by him solely, the presumption will be that the transaction was fraudulent. (*s*)

The presumption of fraud in these cases is never absolute. It may be rebutted by proof of the authority given by the other partners, or of their knowledge and consent, or their ratification; and these, or either of them, may be express, or

(*r*) Hope *v.* Cust, cited in Shirreff *v.* Wilks, 1 East, 48; Ridley *v.* Taylor, 13 id. 175; Green *v.* Drakin, 2 Stark. 347; *Ex parte* Goulding, 2 Glyn & J. 118; Heath *v.* Sansom, 2 B. & Ad. 291; *Ex parte* Thorpe, 3 Mont. & Ayr. 716; Wintle *v.* Crowther, 1 Cromp. & J. 316; Snaith *v.* Burridge, 4 Taunt. 684; *Ex parte* Aagace, 2 Cox, 312; Davenport *v.* Runlett, 3 N. H. 386; Greeley *v.* Wyeth, 10 id. 15; Williams *v.* Gilchrist, 11 id. 535; Livingston *v.* Hastie, 2 Caines, 246; Lansing *v.* Ten Eyck, 2 Johns. 300; Livingston *v.* Roosevelt, 4 id. 251; Dob *v.* Halsey, 16 id. 34; Foot *v.* Sabin, 19 id. 154; Laverty *v.* Burr, 1 Wend. 529; Whitaker *v.* Brown, 11 id. 75; Gansevoort *v.* Williams, 14 id. 133; Wilson *v.* Williams, id. 146; Chazournes *v.* Edwards, 3 Pick. 5; Rogers *v.* Batchelor, 12 Pet. 221; Baird *v.* Cochran, 4 S. & R. 397; Cotton *v.* Evans, 1 Dev. & B. Eq. 284; Wead *v.* Richardson, 2 Dev. & B. 535; Pierce *v.* Pass, 1 Porter, 232; Mauldin *v.* Branch Bank, 2 Ala. 511; Hagar *v.* Mounts, 3 Blackf. 57, 261; Hickman *v.* Reineking, 6 id. 388; Lanier *v.* M'Cabe, 2 Fla. 32; Clay *v.* Cottrell, 18 Penn. St. 408; King *v.* Faber, 22 id. 21; Darling *v.* March, 22 Me. 184; Elliott *v.* Dudley, 19 Barb. 326; Miller *v.* Hines, 15 Ga. 197. See Leveson *v.* Lane, 13 C. B. N. S. 278; Williams *v.* Brimhall, 13 Gray, 462; Casey *v.* Carver, 41 Ill. 228; Rutledge *v.* Squires, 23 Iowa, 53.

(*s*) Evernghim *v.* Ensworth, 7 Wend. 326; Gram *v.* Cadwell, 5 Cow. 489; Farrar *v.* Hutchinson, 9 A. & E. 641; Greeley *v.* Wyeth, 10 N. H. 15. If a firm is sued upon a note given in the partnership name, partly for a partnership debt and partly for the separate debt of one or more of the partners, it *seems* that the firm is liable so far as the note is founded upon a partnership consideration. Wilson *v.* Lewis, 2 Man. & G. 197; Barker *v.* Burgess, 3 Metc. 273. See Barber *v.* Backhouse, 1 Peake, 61; Wintle *v.* Crowther, 1 Cromp. & J. 316; *Ex parte* Kirby, Buck, 511.

be inferred from their acts, or usage, or any circumstances which reasonably imply them. (*t*) The presumption seems to be held much more strongly in this country than in England. There, indeed, the courts would seem to hold, that, if the name of the partnership be used by a partner even for his private debt, the partners will be held, unless they can show covin or fraud on the part of the holder; and the mere fact that it was the private debt of one partner to him will not amount to *primâ facie* proof of this. (*u*) In a recent English case, in a

(*t*) Frankland *v.* M'Gusty, 1 Knapp, Pr. C. 274; *Ex parte* Bonbonus, 8 Ves. 540; *Ex parte* Thorpe, 3 Mont. & A. 716; Gansevoort *v.* Williams, 14 Wend. 133; Wilson *v.* Williams, id. 146; Cotton *v.* Evans, 1 Dev. & B. Eq. 295; Noble *v.* M'Clintock, 2 W. & S. 152; Pierce *v.* Pass, 1 Porter, 232; Brewster *v.* Mott, 4 Scam. 378; Jones *v.* Booth, 10 Vt. 268; Miller *v.* Hines, 15 Ga. 197; Darling *v.* March, 22 Me. 184. See Corbin *v.* McChesney, 26 Ill. 231; Warren *v.* Dickson, 30 Ill. 363; Sternburg *v.* Callaman, 14 Iowa, 251, adopted and confirmed in Cadwallader *v.* Blair, 18 Iowa, 420; Carver *v.* Dows, 40 Ill. 374; Wise *v.* Copley, 36 Ga. 508. But proof of knowledge that the indebtedness or obligation of the partnership had been applied by one partner to pay his own debt is not proof of consent to or satisfaction of such misapplication by the other partners, so as to rebut the presumption of fraud in the creditor. *Ex parte* Aagace, 2 Cox, 312; Elliott *v.* Dudley, 19 Barb. 326.

(*u*) Compare Ridley *v.* Taylor, 13 East, 175; Frankland *v.* M'Gusty, 1 Knapp, Pr. C. 274; *Ex parte* Aagace, 2 Cox, 312; *Ex parte* Bonbonus, 8 Ves. 540; *Ex parte* Thorpe, 3 Mont. & A. 716; Musgrave *v.* Drake, 5 Q. B. 185; with Davenport *v.* Runlett, 3 N. H. 386; Lansing *v.* Gaine, 2 Johns. 305; Dob *v.* Halsey, 16 Johns. 34; Gansevoort *v.* Williams, 14 Wend. 133; Chazournes *v.* Edwards, 3 Pick. 5; Rogers *v.* Batchelor, 12 Pet. 221; Cotton *v.* Evans, 1 Dev. & B. Eq. 284; Pierce *v.* Pass, 1 Port. 232. In Dob *v.* Halsey, *supra*, Spencer J., said: "The only difference between the decision of this court and that of the King's Bench consists in this: We require the separate creditor, who has obtained the partnership paper for the private debt of one of the partners, to show the assent of the whole firm to be bound. The rule of the King's Bench throws the burden of avoiding such security on the firm, by requiring them to prove that the act was covinous on the part of the partner for whose private debt the paper of the firm was given, by showing that it was done without the knowledge, and against the consent, of the other partners, and that the fact was known to the separate creditor when he took the paper of the firm." In Rogers *v.* Batchelor, 12 Pet. 221, the question was raised whether it made any difference that at the time of the transaction the separate creditor had no knowledge that there was a misappropriation of the partnership funds? Judge Story said: "It is true that the precise point now before us does not appear to have received any direct adjudication; for in all the cases above mentioned there was a known application of the funds or securities of the partnership to the payment of the separate debt. But we think that the true principle to be extracted from the authorities is, that one partner cannot apply the partnership funds or securities to the discharge of his own private debt without their consent; and that without their consent their title to the property is not divested in favor of such separate cred-

suit on a bill of exchange accepted by a partner in the name of the firm, which bill included with the debt of the firm a private debt of the partner, the court directed a verdict for only
* 113 the amount that was due from the firm. (*uv*) We * shall, in a future chapter, speak of this question more fully in regard to negotiable paper.

Property purchased by one partner with the funds of the partnership, in his own name or that of his wife, will be considered in equity as belonging to the partnership, and held in trust for it. (*uu*).

If a partner makes a fraudulent use of the name or property of his firm, it should be clearly and immediately repudiated by them as soon as it comes to their knowledge; and any long delay may work a ratification. (*uuu*)

It is sometimes important, in reference to liability for debt, as in other respects, to determine when a partnership begins. For example, if a man orders goods sent to another, and they are so sent and charged to the first party, and the seller discovers that the orderer and receiver were partners in the transaction, both are liable. But if the goods were to be supplied to the receiver by the orderer, and manufactured on certain terms by the party receiving them, and the new products when manufactured (and not before) were to be the joint property of the two as partners, then the receiver of the goods would not be liable. (*v*)

The general principle which answers the question when a partnership begins, for the purpose and with the effect of casting upon the members of the firm the liability of partners,
* 114 must of course * be that the liability of persons on

itor, whether he knew it to be partnership property or not. In short, his right depends, not upon his knowledge that it was partnership property, but upon the fact whether the other partners had assented to such disposition of it or not." Brewster *v.* Mott, 4 Scam. 378. See the language of Spencer, J., in Dob *v.* Halsey, 16 Johns. 39. [It was distinctly adjudged in Achley *v.* Stachlin, 56 Mo. 558, that the fact that a creditor had no knowledge was immaterial.

(*uv*) Ellston *v.* Deacon, Law Rep. 26, B. 20.

(*uu*) Holdredge *v.* Gwynne, 3 Greene (N. J.), 26; [Renfrew *v.* Pearce, 68 Ill. 125.]

(*uuu*) Marine Co. of Chicago *v.* Carver, 41 Ill. 66; Casey *v.* Carver, id. 225.

(*v*) Gardiner *v.* Childs, 8 Car. & P. 345; Broune *v.* Gibbins, 5 Bro. & C. 491 (Dublin ed.), 3 id. 127.

contracts not made by themselves, and as partners, begins at the moment when they begin to have a joint interest in the contracts as partners. For if a person purchases goods or borrows money upon his own credit, and it is afterwards discovered that the goods or the money have been applied to the use of a partnership of which he is a member, the firm will be liable for the price of the goods or the amount of the loan, if, from the nature and circumstances of the transaction, the firm may be regarded as the real purchaser or borrower, which has acted through its authorized agent; otherwise, only the party to whom credit was actually given can be held. Suppose there is no partnership in contemplation at the time goods are sold or money is loaned. In such case, though the money or the goods subsequently go to the use of a copartnership, of which the visible contracting party is a member, there can be no pretence for holding the firm liable, since, at the time of the formation of the contract, it had no existence even in intention. (*w*)

(*w*) Such was the case of Young *v.* Hunter, 4 Taunt. 582. Hunter & Rayney had purchased goods of the plaintiffs and other persons, which they intended to ship for the Baltic; and the defendants, Hoffham & Co., who were not otherwise partners of Hunter & Co., were afterwards allowed to join in the adventure, and to have a fifth share upon the goods being put on board. The plaintiffs knew nothing of Hoffham & Co., but sold the goods to Hunter & Co. only. The question was, whether Hoffham & Co., having had the benefit of the goods, were liable to pay for them. Heath, J.: "The proposition of the plaintiffs, that, if it be shown that at any one period of the transaction there was a partnership subsisting, it was therefore to be inferred that there had been a partnership in the original purchase, is wholly unfounded." Chambre, J., was of the same opinion; and Gibbs, J., said: "The only possible ground for a new trial would be, if the plaintiff's could show that at the time of the purchase of the goods from the plaintiffs, Hoffham & Co. and Hunter and Rayney were concerned in that purchase on their joint account. Now, the only evidence given of it was, that at the time of the shipment they were so interested. How long before the shipment the purchase was made, does not appear; but it is not to be inferred, from Hoffham & Co. being interested at the time of the shipment, that they were interested at the time of the purchase. It is for the plaintiffs, who seek to implicate them, to make it out by evidence.

On the other hand, if parties have agreed to be partners for the prosecution of a joint adventure, and one of them with the view pledges his credit for his allotted contribution to the joint capital, he only can be made liable upon the contract, unless, at the time of making it, the partnership was in existence and capable of being a contracting party. And hence, if by the parties' agreement the beginning of the partnership appear clearly dependent upon some act or event subsequent to the making of the contract in question, the possibility of the firm's being liable thereon is at once

SECTION V.

WHEN A PERSON IS LIABLE BECAUSE HE IS HELD OUT AS A PARTNER.

We have already seen that one may be liable as a partner who is not so in fact, if he suffers himself to be held out

excluded. This proposition is illustrated by the case of Saville *v.* Robertson, 4 T. R. 720. There the action was for goods sold and delivered. The defendants, J. Robertson and J. Hutchinson, had entered into the following (amongst others) articles of agreement, with S. Pearce and William Robertson: "Articles of agreement made the 19th of April, 1787, between J. Robertson and J. Hutchinson of London, merchants and copartners, as well on the part of themselves as of others who have or shall subscribe their names on the back of these presents, of the one part, and S. Pearce & Co., merchants, of the other part, namely, Whereas the said S. Pearce is the sole owner and proprietor of the ship Triumph, &c., and whereas the said J. Robertson, J. Hutchinson, S. Pearce, and others who have subscribed their names on the back of these presents, have mutually agreed upon a joint undertaking, and risk as to profit and loss in a certain voyage or maritime adventure about to be performed under the direction of the said parties, who have or shall have a majority of interest therein, or by a committee appointed by them; now these presents witness that they, the said J. R. & J. H., on behalf of themselves and all others who have or shall subscribe, &c.; and the said S. P. for himself, in consideration of the trust which they severally repose in each other, and also in pursuance of the said agreement, have and do, each for himself, his heirs, executors, &c., mutually covenant and agree with each other, &c.: 1. That the said ship 'Triumph,' whereof the said S. Pearce is sole owner, shall, from the day of this date and until her return from her intended voyage, be at the disposal, direction, and risk of all the said parties hereto jointly, at the valuation of 3,750*l.*, &c. 2. That the said J. R. & J. H., by themselves and others who have or shall subscribe, &c., shall and will on or before the 24th August next procure and provide a cargo of goods for the said intended voyage, to the value of between 22,000*l.* and 25,000*l.*, and which goods shall, in the judgment and opinion of the majority of the parties to these presents, be deemed eligible and proper for the voyage and markets; and that the said goods shall be furnished or purchased at the lowest cash prices, although not payable till the usual period of credit is expired; the difference between the said cash terms and the given credit to be made good by giving bonds bearing interest from the date of the contract of such goods; and that they, the said J. R. & J. H., and other the persons who subscribe, &c., shall and will prepare and ship the said cargo at such time and in such manner as the majority of the said concerned or their committee shall direct. 3. That all additional outfits of the ship 'Triumph,' in cables, &c., which she may require, &c., after the date hereof, until her voyage be concluded, shall be on the joint account, &c. 4. That, in case the said S. Pearce shall be desirous to increase his interest in the said joint concern, he shall be permitted so to do, by shipping on the joint account as many goods over and above the goods to be shipped by the said J. R. & J. H., and others who shall subscribe, &c., as he may think proper; but the said goods

to the world * as a partner. (*x*) The reason is obvious. * 116
Any person may lend his credit to another, as he may

so to be shipped by the said S. Pearce, are to be such articles as the majority of the concerned or their committee shall approve of as proper for the voyage and market. 5. That the said 3,750*l.*, together with the amount of the additional outfits to be advanced by the said S. Pearce, the amount of half of the premiums of insurance to be made the said S. P. on the said ship, freight, and cargo, and such amount of goods as the said S. P. may ship on the joint account as above mentioned, shall be considered as the said S. P.'s share or capital in the said joint undertaking; and he the said S. P. shall be entitled to receive the profit or bear the loss thereon in the exact proportion as the amount of all such sums shall be to the remainder or other part of the said joint concern; and that the said J. R. & J. H., and the subscribers, &c., shall receive the profit and bear the loss in the like proportion as to the sums set opposite to their several names. 11. That in case the said S. P. shall want the assistance of the said J. R. & J. H., or the subscribers, &c., to procure him the loan of any money to enable him to complete the outfits, they engage to procure him 500*l.*, to be repaid by him in a manner as therein stipulated." On the 28th July, 1787, the following memorandum was indorsed on the said article by the same persons: "Notwithstanding what may be understood to be the meaning of the foregoing articles, it is hereby declared by all the parties, that the minute made on the 26th June last and signed by us, respecting each of us holding the proportions of one quarter each, that is to say, Robertson & Hutchinson one-half, and S. Pearce and W. Robertson one-quarter each, it is now fully to be considered and understood that that minute is now declared null and void, and that each party whose name is hereunto subscribed is to hold no other share or proportion in the said concern than the amount of what each separately orders and ships; and which interest will be hereafter declared agreeably to the true intent and meaning of this agreement. And it is further declared that the orders given for the cargo and outfit of the ship are to be each separately paid, and that one is not bound for any goods or stores ordered or shipped by the other. And that the said S. Pearce has full liberty to ship what goods are suitable for the voyage, over and above the ship and outfit, leaving room clearly for those ordered by Robertson & Hutchinson, and W. R.; and it is to be understood that the ship is made over in trust for the general concern." In May, 1787, the plaintiff, by the order of Pearce, supplied copper to sheathe and repair the ship 'Triumph,' to the amount of 48*l.* In August, 1787, the plaintiff, by the order of Pearce, delivered copper on board the said ship to the amount of 938*l.* 3*s.* 3*d.*, which formed part of the cargo thereof. In October, 1787, the said ship sailed from London for Ostend, and proceeded from thence to the East Indies with the goods so furnished by the plaintiff, and other goods on board. In January, 1788, Pearce became a bankrupt, and Saville proved his debt under the commission against him; and in February, 1788, William Robertson also became a bankrupt. On the ship's return in 1789, Robertson, without advising Pearce's assignees, went on board and took her to Ostend,

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(*x*) See Edmundson *v.* Thompson, 2 Fost. & Fin. 564; Reber *v.* Col. Machine Manuf. Co., 12 Ohio, 175; Drennan *v.* House, 41 Penn. 30; Sherrod *v.* Langdon, 21 Iowa, 518; [Rice *v.* Barrett, 116 Mass. 312. *In re* Jewett, 15 N. B. R. 126; Cushing *v.* Smith, 43 Texas, 261.]

* 117 lend his money or property; and * if he chooses to lend his credit or responsibility, he must of course abide by

and sold her for his own and Hutchinson's benefit, because, as he admitted, "he and his partner were liable to pay the whole debt, for ship and cargo." In January, 1790, the defendants became bankrupts. It being admitted that the plaintiff was entitled to recover for the copper for sheathing, the question in the case was, whether, upon a construction of the above articles, taken in connection with the defendants' admission and their acceptance of bills drawn for the price of these very goods, the plaintiff could recover for the residue of the copper. It was *held* that he could not; and, further, that the contract of sale not having originally been with the partnership, no act which passed subsequent to the delivery of the goods could have any retrospect so as to alter the nature of the contract. Lord Kenyon said: "The facts of the case are shortly these: several persons who had no general partnership, nor any connection with each other in trade, formed an adventure to the East Indies. The outfit of the vessel was a joint concern of all the partners; and that delivers the case from one consideration, namely, the parcel of copper for sheathing the ship, which is admitted to be a partnership concern. But beyond that I see no partnership between the parties till all the parcels of the cargo were delivered on board; and that made it a combined adventure between all the parties. I cannot, therefore, see how it can be said that these goods, which were sold to Pearce only, and on his sole credit and account, were sold and delivered on the partnership account. Afterwards, indeed, these defendants were to gain or lose by the joint cargo: when the other goods were brought in, the partnership arose; but each was to bring in his own particular stock. But in this case I think that the question stops short of affecting the defendants, and I cannot see how the plaintiff can have a right to call on the defendants, as partners, for the value of these goods, on a supposed contract, when the real contract between the buyer and seller was consummated before the joint risk began." The case of Post *v.* Kimberly, 9 Johns. 470, is somewhat analogous in its facts, and exemplifies the same principle. See Ward *v.* Thompson, 1 Newb. Adm. 95, where, however, the question arose between the partners: Spalding *v.* Hedges, 2 Barr, 240, 243; Dunham *v.* Rogers, 1 Barr, 255. On the other hand, Gouthwaite *v.* Duckworth, 12 East, 421, is a case in which, from the character of the agreement between the parties, the partnership was deemed to be in no way dependent for its beginning upon any commingling of the several partners' contributions, nor upon any other appropriation thereof to the joint fund; but to have been in existence at the time of and for the purpose of the purchase of such contributions. Lord Ellenborough, C. J., there said: "It comes to the question, whether, contemporary with the purchase of the goods, there did not exist a joint interest between these defendants. The goods were to be purchased, as Duckworth states in his examination, *for the adventure;* that was the agreement. Then what was this adventure? Did it not commence with the purchase of these goods for the purpose agreed upon, in the loss and profits of which the defendants were to share? The case of Saville *v.* Robertson does indeed approach very near to this; but the distinction between the cases is, that there each party brought his separate parcel of goods, which were afterwards to be mixed in the common adventure on board the ship, and till that admixture the partnership in the goods did not arise. But here the goods in question were purchased, in pursuance of the agreement *for the adventure*, of which it had been before settled that Duckworth was to have a

the consequences of any contracts made on the faith of * it. * 118
Most cases of this kind occur where a partner retires

moiety. There seems, also, to have been some contrivance in this case to keep out of general view the interest which Duckworth had in the goods: the other two defendants were sent into the market to purchase the goods in which he was to have a moiety; and though they were not authorized, he says, to purchase on the joint account of the three; yet, if all agree to share in goods to be purchased, and in consequence of that agreement one of them go into the market and make the purchase, it is the same, for this purpose, as if all the names had been announced to the seller, and therefore all are liable for the value of them." Bayley, J., said: "In Saville *v.* Robertson, after the purchase of the goods made by the several adventurers, there was still a further act to be done, which was the putting them on board the ship in which they had a common concern for the joint adventure; and, until that further act was done, the goods purchased by each remained the separate property of each. But here, as soon as the goods were purchased, the interest of the three attached in them at the same instant by virtue of the previous agreement." So in Everitt *v.* Chapman, 6 Conn. 347. There A., B., & C. were in partnership in the business of tanning hides, under an agreement by which A. was to furnish hides for one-half of the stock, and was to receive and make market for one-half of the leather, and B. & C. were to furnish the other half of the stock, and to make market for the other half of the leather; each of the partners to purchase on his own separate credit. B. bought hides of the plaintiff, which were charged to him individually. But, afterwards discovering the partnership, the plaintiff brought his action against A., B., & C. It was *held*, that the firm were liable for the value of the hides. The court cited Gouthwaite *v.* Duckworth, *supra*, and, commenting on Saville *v.* Robertson, referred to by the defendants, said: "This authority, then, is so far from justifying the defence, that it vindicates the claim of the plaintiff; for these defendants *were in partnership* when the hides were purchased — *they were bought for the concern* — they were delivered into their tannery — they went to their joint benefit, having been purchased by H. R. Mott, without disclosing the names of his copartners." See also, to the same effect, a *dictum* of Gibbs, J., in Young *v.* Hunter, 4 Taunt. 583; Brooke *v.* Evans, 5 Watts, 196; Griffith *v.* Buffum, 22 Vt. 181. In Wilson *v.* Whitehead, Ackerman & Carleton, 10 M. & W. 503, the action was assumpsit for goods sold and delivered to the defendant, Whitehead, to be used in printing the "Sporting Review." To establish the joint liability with him of Ackerman & Carleton, a verbal agreement between the three was proved that they should bring out and be jointly interested in the "Sporting Review;" Ackerman was to be the publisher, and to make and receive general payments, Carleton to be the editor, and Whitehead the printer; and, after payment of all expenses, the three were to share the profits of the publication equally. Whitehead was to furnish the paper for the work, and to charge it to the account at cost price, and was also to charge the printing at "master's prices." On this evidence, the court directed a nonsuit, on the ground that the other defendants were not jointly liable with Whitehead in this action, giving the plaintiffs leave to move to enter a verdict for the admitted value of the paper. On the hearing of the motion, Parke, B., said: "The question is, Did the other defendants authorize Whitehead to purchase the paper on their account, or on his own? It appears to me, on the true construction of the contract, that the latter was the case. When the paper was in his

from a firm, and his retirement is unknown, either through his wish or his negligence. These we propose to consider together in reference to the duties and liabilities of a retiring partner.

* 119 It has been said, holding out one's self as partner *to the world* " is * not a wise expression;" and the question should be, " whether he so held himself to the plaintiff, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner."(*y*) But to hold one's self out " to the world " means, precisely, so to hold one's self out as to justify anybody and everybody in believing him a partner; and it seems to be a very good expression for this purpose. It is a different case, when the plaintiff relies upon the fact that the party sought to be charged so held himself out specifically to the individual charging him.

Where a creditor sues a firm, and seeks to put the liability of a partner upon one who is only a nominal partner, it is a somewhat difficult question, whether the plaintiff can recover without proof that he himself believed the person whom he seeks to charge to be a partner. The authorities on this question are far from unanimous: some holding that one put forth to the world as a partner is liable as such to every creditor of the firm; while others hold that he is thus liable, only because he was a partner in fact and in interest, or because the plaintiff regarded him as one, and dealt with the firm, in some degree at least, on his credit. (*yy*) We think a reasonable rule may be stated thus: Where one is held forth to the world as a

possession, he was at liberty to have appropriated it to any other purpose than to the 'Sporting Review.'" That is, from the nature of the agreement between the parties, it was apparent that, contemporary with the purchase of the goods in question, there was no joint interest in them on the part of the defendants; but their joint interest therein arose subsequent to the contract of sale, and only after some act had been performed by Whitehead by which the paper was appropriated to the use of the partnership." See Barton *v.* Hansom, 2 Taunt. 49; Aspinwall *v.* Williams, 1 Hamm. 38; Austin *v.* Williams, id. 282. Of course, the same considerations are applicable, where, in pursuance of an agreement to prosecute an adventure in company, one or more of the partners, on his own credit, borrows money, and puts it into the firm as his contribution to the joint fund. Smith *v.* Craven, 1 Cromp. & J. 500.

(*y*) So said, by Parke, J., in Dickinson *v.* Valpy, 10 B. & C. 140.

(*yy*) Wood *v.* Pennell, 51 Me. 52; Fitch *v.* Harrington, 13 Gray, 468.

partner, the first question is, Was he so held out by his own authority and assent, or connivance, or negligence? If by his authority, assent, or connivance, the presumption is absolute, that he was so held out to every creditor or customer. If so held out by his own negligence only, he should be held only to a creditor who had been actually misled thereby. (*z*)

(*z*) In Young *v.* Axtell, cited in 2 H. Bl. 242, Lord Mansfield said that the defendant, Mrs. Axtell, "as she suffered her name to be used, and held herself out as a partner, was certainly liable, though the plaintiff did not, at the time of dealing, know that she was a partner, or that her name was used." See Dolman *v.* Orchard, 2 C. & P. 104. And there can be no doubt that, in a great majority of the cases on this point, a party has been allowed to charge a person as a partner, by proving that he has publicly held himself forth as one; without being further required to prove a knowledge of such holding out, on his part, contemporaneous with the making of the contract sued upon. But there are authorities which seem to be in favor of the *dictum* of Parke, J., as quoted in the text. In Shott *v.* Streatfield, 1 Moody & R. 8, the question was, whether Green was liable as a partner with Streatfield. A witness testified that he had been told, in Green's presence, that Green had become a partner with Streatfield. The witness then being asked whether he had afterwards reported that Streatfield and Green were partners, it was objected that this was not evidence, unless it was shown that the defendants, or one of them, were present when it was reported. Lord Tenterden, C. J.: "I think it is; because otherwise it will be said presently that what was said was confined to the witness, and the plaintiffs could not have acted on it." In Alderson *v.* Pope, 1 Camp. 404, note (*a*), where C. was held out to the world as a partner with A. & B., but was not one in reality, this fact being known to the plaintiff was held to preclude him from holding C. liable as partner. See, however, Brown *v.* Leonard, 2 Chitty, 120. In Carter *v.* Whalley, 1 B. & Ad. 11, the action was assumpsit by the indorsee against the acceptors of a bill of exchange. The facts were these: S. and others, the defendants, had carried on business under the name of the "Plas Madoc Colliery Company." But, some time before the acceptance of the bill in question by the company, S. had retired from the firm, though no notice of his withdrawal had ever been given, either to the plaintiff or to the public. The question was as to the liability of S. upon the bill thus accepted by the company after his retirement; and it being proved that the plaintiff had not dealt with the company while S. was a member, and that the partnership during that time had not been so known when the plaintiff did business, that he must be supposed to have looked upon Saunders as a partner, in default of notice to the contrary, Lord Tenterden ordered a nonsuit. On motion for a rule to show cause, Parke, J., said: "Saunders had given no direct authority: he was not a partner at the time. But he may by his conduct have represented himself as one, and induced the plaintiff to give him credit as such, and so be liable to the plaintiff. Such would have been the case if he had done business with the plaintiff before as a member of a firm, or had so publicly appeared as a partner as to satisfy a jury that the plaintiff must have believed him to be such; and if he had suffered the plaintiff to continue in and act upon that belief, by omitting to give notice of his having ceased to be a partner, after he really had ceased, he would be responsible for the consequences of his original

*120 *Persons may come under a general liability, by merely having the same firm name, provided they do
*121 business in such a way as *to lead to the inference

representation, uncontradicted by a subsequent notice. But, in order to render him liable on these grounds, it is necessary that he should have been known as a member of the firm to the plaintiff, either by direct transactions, or public notoriety. In the present instance, that was not so. The name of the company gave no information as to the parties composing it; and the plaintiff did not show that Saunders had dealt with him in the character of a partner, or had held himself out so publicly to be one as that the plaintiff must have known it. Carter, the plaintiff, lived at Birmingham; it should have appeared that there had been such a dealing at that place by Saunders, or that his connection with the company had been so generally known *there* that a knowledge of it by Carter must have been presumed. There having been no evidence for the jury on these points, I think the nonsuit was right." — Rule refused. So in Pott *v.* Eyton, 3 C. B. 39, the same view seems to be taken by the court. The American cases, Benedict *v.* Davis, 2 McLean, 347, Markham *v.* Jones, 7 B. Mon. 456, are to a similar effect. See also Buckingham *v.* Burgess, 3 McLean, 364, 549; Hicks *v.* Cram, 17 Vt. 449.

Regarding the question with reference to the principle which underlies it, Mr. Collyer, referring to the language of Lord Mansfield, in Young *v.* Axtell, above quoted, says: "It appears from this case, that it is not necessary for a person charging a nominal partner to have been aware of the partnership at the time of the contract. And this doctrine seems satisfactory when we consider, that the object of the rule is *to prevent the extension of unsound credit.*" Collyer on Part. (Perkins' ed.) § 86. On the other hand, in 1 Smith Lead. Cas. 507, it is remarked, that "this position appears very questionable; for the rule which imposes on a nominal partner the responsibilities of a *real* one is framed in order to prevent those persons from being defrauded or deceived, who may deal with the firm of which he holds himself out as a member, on the faith of his personal responsibility." Now, it is clear that in these two extracts the liability of a nominal partner rests upon two different principles, leading to two different rules of law. If a nominal partner is to be made liable, "to prevent the extension of unsound credit," then that liability is to be imposed upon him whenever he has held himself forth to the world as a partner, whether he has in fact deceived the particular creditor or not. For, if it be proved that a man has exhibited himself to the world as a partner, then unsound credit has been extended; and the reason for preventing it, by making him liable, is in no way weakened by the fact that a particular creditor has not been deceived. The fact that mischief has not been done in the particular case is no proof that the general and public injury against which the rule was designed to guard has not been caused, and is not therefore any reason for the non-application of the rule to that case. On the other hand, if a nominal partner is to be made liable as a real one, simply to compel him to make good the assurances he has given, and to fulfil the engagements he has led others to suppose he has made, then the doctrine is one of private justice, rather than of public policy. Hence, though a man has held himself out as a partner to the world, yet, if he has not appeared as a contracting party to a particular creditor, there is, in the absence of considerations of public policy, no ground for holding him liable to that creditor, since to him he has given no assurances of his personal responsibility, and with him he has made no engagements. See Wood *v.* Pennell, 51 Me. 52.

suggested by the name, of an identity of interest. (*a*) So, too, if one is a partner in a house for some business, and the other partners carry on another business in which he has no interest, if nothing is done or said and no circumstances exist to indicate his want of community in this last business, so that those dealing with the other partners are justified in believing that they are dealing with him also, he is then liable as a partner. (*b*)

(*a*) James Spencer carried on business in Manchester under the firm of James Spencer & Co.; and William Spencer, in London, under the style of Spencer & Co. It was *held*, that William Spencer, having been in the habit, personally, or by his clerk, of accepting bills drawn upon James Spencer & Co., and addressed to William Spencer's place of business in London, had thereby held himself out as a partner of James, and became liable accordingly. Spencer *v.* Billing, 3 Camp. 310. [And two firms will be held to be one, if they assume to constitute one. Beall *v.* Lowndes, 4 S. C. 258.]

(*b*) Wood & Payne were in partnership as wholesale grocers. Wood, Payne, & Steele were partners in buying and selling cotton; this last business being carried on at Wood & Payne's counting-house, and in the name of Wood & Payne. Steele, however, had no concern in the grocery business, nor did he take an active part in the cotton business; nor was he known as a partner therein, either to the plaintiffs or to the world. Wood & Payne bought groceries of the plaintiffs; for which they gave a bill of exchange received by Wood & Payne, as cotton dealers, for cotton sold to the drawer, and in which Steele was interested. This bill was payable to the defendants or order, and was indorsed by either Wood or Payne, by the name of the firm of Wood & Payne. *Held*, that Steele was liable as partner on such indorsement. Swan *v.* Steele, 7 East, 210. See Miner *v.* Downer, 19 Vt. 14. Assumpsit on a bill of exchange by the indorsees against the defendant as one of the drawers, the other drawer having become bankrupt. The bill was drawn in the name of "James King & Co.," under which firm the defendant and his partners had traded. It also appeared that there were other partnerships carried on under the firm of "James King & Co.," in which the other drawers were concerned, but in which the defendant had no share. The defendant offered to show that this bill was not drawn on account of the partnership in which he was concerned, but on account of one of the others, and that he knew nothing of it. Lord Kenyon was of opinion that the defendant was nevertheless liable; he had traded with the other partners under that firm, and persons taking bills under it, though without his knowledge, had a right to look to him for payment. Baker *v.* Charlton, Peake, 80. See Fleming *v.* McNair, cited in 1 Montagu on Part. 37, note (*c*); and in 3 Dow, 229. In Baker *v.* Nappier, 19 Ga. 520, it appeared that Kilgrow & Price were in partnership in the hotel business, and Kilgrow & Patillo in the grocery business. From the evidence, also, it was doubtful whether each firm did not sometimes use or recognize the name of E. W. Kilgrow & Co as its own. For goods bought of Kilgrow, in the name E. W. Kilgrow & Co., the plaintiffs sought to hold the firm of Kilgrow & Price. The court *held*, that the jury should be instructed, "that, if Baker & Hart (the plaintiffs), after taking reasonable care to find out which firm Kilgrow was dealing for, really thought he was dealing for that in which Mrs. Price

* 122 * In general, conversations, assertions, or admissions, and acts tending to show that parties are partners, and have that joint interest in the business which makes them liable as partners, will often have that effect, (*c*) although * 123 it might be quite insufficient * to prove a partnership as between the partners, if no third parties were interested in the question. (*d*)

was a member, and so sold him the goods, intending them for that firm, and if the goods were adapted to the business of that firm, — then that firm was liable to pay for the goods, although Kilgrow, in truth, intended them for the other firm, and although they went into the other firm."

(*c*) An admission by a person that he is a partner will not estop him from contradicting it by evidence, if the admission was made *after* the contract upon which it is sought to charge him was entered into. Thus, Ridgway, the plaintiff, applied to Brown to build him a gas vacuum engine. Brown afterwards showed him the draft of an agreement therefor, purporting to be between the plaintiff and Brown & Co. The plaintiff desiring to know who composed that firm, Brown indorsed on the back of the draft the names of "John Broadhurst, Esq., and Dr. Wilson Philip." The agreement was not fulfilled, and the plaintiff resolved to proceed for the breach. But, before suit brought, his son called on the defendant Broadhurst, and mentioning his father's intention, and the indorsement made by Brown upon the agreement, begged to know if Brown had been correct in so doing. Broadhurst replied that Brown was right in so doing, and stated that he bought his original interest of the other defendant, Philip. It was also in evidence, that, while the engine was building, Broadhurst attended very frequently at the manufactory, to inquire as to its progress, to give advice, &c. In answer to this, an agreement or license to Broadhurst, from Brown and the other parties interested in the patent, was put in on the part of Broadhurst, authorizing him to use the patent for the erecting of engines *in certain parts of Cornwall only;* and it was contended that the admissions of Broadhurst were to be taken with reference to the interest which he thus possessed in the invention, and not to any participation either in the patent generally, or in the particular transaction in question. Gaselee, J., left it to the jury to say whether Broadhurst, at the time he made the admission, was under a mistake, and whether the acts he was proved to have done did or did not afford a sufficient ground for supposing it to be a mistake; and, with regard to those acts, he left it to the jury to say whether they were referable to a partnership in the patent in general, or in this particular transaction, or whether they were done by Broadhurst to satisfy himself as to the license he had obtained for erecting the same engines in Cornwall, being likely to be productive to him or not. The jury having found a verdict for the defendants on the ground that Broadhurst was not a partner, a rule for a new trial was refused. Ridgway *v.* Philip, 1 C., M. & R. 415.

(*d*) Action for money had and received, to determine whether the plaintiff had been a trader within the meaning of the bankrupt laws. The plaintiff resided under the roof of Greenwood, his brother-in-law, who had long been a trader. Greenwood persuaded the plaintiff to enter into partnership with him. There was a long negotiation between them; and numerous conversations were proved, in which the plaintiff said, sometimes that he had become a partner, sometimes that he was about to become one. There was no evi-

The rule must be, that every one who authorizes another to believe him a partner, is, as to the person so authorized, a

dence of any express agreement, nor of any interference in the business by the plaintiff, except that he had once gone in company with Greenwood to a dyer's, and, having inquired about some goods that were left with him to be dyed, spoke of them as the joint property of himself and Greenwood. The partnership, if any existed, only lasted from the 22d of March till the 9th of May, during which time no act of buying and selling was proved. The jury, upon this evidence, having found for the defendant, and having thereby established that the plaintiff was a partner with Greenwood, and therefore liable to the bankrupt laws, the Court of Common Pleas refused to disturb the verdict. Parker *v.* Barker, 1 Brod. & B. 9. In Goode *v.* Harrison, 5 B. & Ald. 147, the facts were these: In April, 1818, Goode & Bennion called upon Fair, a broker at Manchester, when Goode introduced Bennion as a friend of his from Liverpool, and said, "We want goods." Fair introduced them to Harrison and other houses in Manchester, as the firm of Goode & Bennion. They bought goods of Harrison and other persons to a considerable amount, the invoices of which were made out, some to the firm of Goode & Bennion, others to John Goode & T. Bennion, and were seen by them. The goods were forwarded to the address of Goode & Bennion. At this time, also, Goode said, in the hearing of Bennion, that if the goods they then bought would answer the purpose, in a very short time they would have five hundred pieces of one sort, and five hundred of another sort. After this, Fair corresponded with the firm of Goode & Bennion. In April, 1818, Goode & Bennion had a counting-house in Liverpool, and the name of Goode (who had been some time in the counting-house before this transaction of Goode & Bennion, but had not shipped goods before) appeared on the private door, and remained there till August, 1819. But the name of Bennion never appeared on the door at all. In January, 1819, Fair received a letter ordering more goods, in the handwriting of Goode, in which the pronoun *we* was used throughout, and which concluded, "I am, for G. & B., very respectfully yours, John Goode." Fair consequently bought goods of Harrison, and forwarded the same, as also a bill of parcels, to the direction of Goode & Bennion. He also drew a bill of exchange, for the amount of these goods, upon Goode & Bennion, which bill was accepted by Goode in the name of the firm. Fair did not see Bennion from the time of his being in Manchester, in April, 1818, till February, 1819; at which time Bennion asked Fair for the account current of Goode & Bennion for goods bought when he and Goode came to Manchester in April, 1818, and said that the transaction of April, 1818, was the only one that he was engaged in with Goode, and that all that account should be paid. But Bennion did not say in 1818, that he was going to enter into only one adventure with Goode, and there was further put in a letter from him to Fair in the following terms: "Liverpool, 20th April, 1819. Dear sir, we shall be obliged by your purchasing for our account one hundred pieces of the fancied bordered gingham, &c. I remain, dear sir, for Goode and self, yours, T. Bennion." On the other hand, it was testified by Riley, who was in the employ of Goode, and kept the books till the end of April, 1818, but who then went to Barbadoes with the goods first purchased of Harrison, that he never knew Bennion's name to be used in the purchase of goods after April, 1818. A principal question in the case, being how far Bennion was liable as a partner with Goode, for the goods purchased as above, it was *held*, by the Court of King's Bench that from the above facts it appeared that he had been so held out as partner as to be liable for the goods bought after

* 124 partner: * but it must also be true that this authorization must be such as would be so regarded by a reasonable and fair man; and a mere conjecture that a man is a partner, even from circumstances tending that way, is not sufficient to hold him as such. (*e*)

as well as in April, 1818. Palmer *v.* Pinkham, 33 Me. 32, illustrates the same rule. There the question was whether Sayward had been held out as a partner with Pinkham upon the following facts: In October, 1848, Pinkham applied to the plaintiffs to purchase goods, representing himself as in company with Sayward, under the firm of Horace A. Pinkham & Co. The plaintiffs thereupon sold him goods on credit, and charged them to Horace A. Pinkham & Co. They afterwards directed their attorney to ascertain whether Pinkham and Sayward were really in partnership. The attorney testified that he called upon Pinkham, and received assurances from him that they were so. Of Sayward he asked the question, "Are you in company in the store with Pinkham?" and received the answer, "Yes" But it appeared that Sayward was the owner of the store in which the business in question was done, subject only to a right of redemption in Pinkham; and that he might therefore have supposed that the question of the plaintiffs' attorney referred to the store only, and not to the business there transacted, and might have framed his answer accordingly. Upon this ground, the verdict of the jury at *nisi prius*, in favor of the defendant, was attempted to be supported. But the court *held*, that the word "company," when applied to persons engaged in trade, denoted those united for the same purpose in a joint concern; that it was so commonly used in this sense, as indicating a partnership, that few persons accustomed to purchase goods at shops where they are sold by retail would misapprehend that such was its meaning; that the defendant Sayward must be supposed to have understood its meaning as used in common parlance; that he must be responsible for the ideas which the language of his answer was suited to convey to other minds; and, that if there was any thing equivocal in it, and other persons were fairly entitled to receive it as making known to them that he was a partner of Pinkham in the business transacted in that store, he could not be relieved from the consequences resulting from his own language, fairly interpreted. See further Dutton *v.* Woodman, 9 Cush. 255.

(*e*) This is well illustrated by the language of the court in Baker *v.* Nappier, 19 Ga. 520. There were two firms: the one composed of Kilgrow & Price, hotelkeepers; the other, of Kilgrow & Patillo, grocers. From the evidence, it was doubtful whether either partnership had a well-settled firm-name, or whether each did not sometimes use or recognize the name of E. W. Kilgrow & Co. as its own. For goods sold to Kilgrow, it was sought to hold the firm of Kilgrow and Price. By the court: "A merchant, in dealing with a person known to him to be a member of two different firms, and in respect to goods suitable to either firm, would in general be in the exercise of no more than ordinary care, if he called on that person to know which was the firm he was dealing for. And if, without making any such inquiry, the merchant should sell the person the goods, thinking him to be acting for one firm when he was acting for the other, the merchant could, in general, hold only the firm for which the person was really acting, liable." And it was *held*, that the jury should have been instructed as follows: "If Baker & Hart (the plaintiffs), after taking reasonable care to find out which firm Kilgrow was dealing for, really thought he was dealing for that in which Mrs. Price was a member, and so sold him the goods,

*Every partnership should have its proper name *125
or style. It may be whatever name the partnership chooses; (*ee*) and this name need not be prescribed in the articles, or determined upon by express agreement. It may grow out of the custom of the firm, and the manner in which it carries on its transactions. (*f*) If it have no name, and even if it avoid having one, *the responsibilities of those who *126
can be shown to be actually partners will not be prevented

intending them for that firm, and if the goods were adapted to the business of that firm, — then that firm was liable to pay for the goods, although Kilgrow, in truth, intended them for the other firm, and although they went into the other firm."

(*ee*) Crawford *v.* Collins, 45 Barb. 269.

(*f*) In Le Roy *v.* Johnson, 2 Pet. 186, Hoffman & Johnson had entered into articles of copartnership, and one of the questions in the case was, what the firm-name was. Washington, J., said: "It is quite clear that the name of this firm is nowhere designated in the articles of copartnership which have been referred to. The mode in which a particular branch of their business was to be conducted cannot reasonably be construed to give a name to the firm. It manifestly had no allusion to that subject. The stipulation that the funds necessary for the purposes of the concern should be raised upon the paper of Johnson, to be indorsed by Hoffman, or in such other shape as might be found most suitable to the object of the parties, no more designated Jacob Hoffman than it did George Johnson as the name of the copartnership. It is unnecessary to decide whether the omission to agree upon a partnership name in the body of the instrument was or was not supplied by the signatures of the contracting parties to it; because it was in full and uncontradicted proof, that, after the concern went into operation under the articles, their books were kept, and the bills and accounts relating to their business were made out at their warehouse, in the joint names of Hoffman & Johnson, by which name the firm was generally known in Alexandria, and in which they acted in relation to the business of the concern, and advertised in the newspapers. Now, it cannot be questioned but that a name thus assumed, recognized, and publicly used, became the legitimate name and style of the firm, not less so than if it had been adopted by the articles of copartnership." W. G. & C. agreed to enter into partnership; but the articles were silent as to the name of the firm. C. bought merchandise on joint account, and executed a note therefor, signed in the name of himself & Co. It was *held*, that, in the silence of the articles on the subject, the fair presumption was that the style adopted by C. was that agreed upon by the parties as the name of the firm. Aspinwall *v.* Williams, 1 Hamm. 38; Drake *v.* Elwyn, 1 Caines, 184. In Ripley *v.* Colby, 3 Foster, 443, the court said: "Was the evidence competent to show that the plaintiffs constituted the firm of S. F. Ripley & Co. The evidence was direct that the plaintiffs agreed to hire a stable for their common use; that they afterwards occupied this stable according to this agreement; that they furnished money in the stipulated proportions to pay their hostler, and to pay the rent. They made these repairs on the building while they so occupied it. They entered and held under a lease made by the defendants to S. F. Ripley & Co. This must be *held* competent and quite satisfactory evidence that the plaintiffs were partners under the firm of S. F. Ripley & Co., and, as such, made the repairs in question."

or lessened. (*g*) But, when there is an adopted and recognized style, nothing else, as such, binds the partnership. (*gg*) But though a partnership style has been agreed on in the articles or otherwise, and has been used accordingly, proof that another name is also customarily employed in the dealings of the firm, with the concurrence of all the partners, or even of the managing partner alone, will suffice to make that name one by which the partnership will be bound. (*h*) If the style be A., B., & Co., the Co. being C., a note signed A., B., & C., in which they jointly and severally promise to pay, is not a
*127 partnership note. (*i*) *Neither would a note signed

(*g*) See Bank of Rochester *v.* Monteath, 1 Denio, 402.

(*gg*) See *ante*, p. *95.

(*h*) Williamson *v.* Johnson, 1 B. & C. 146. Abbott, C. J.: "It appears from the evidence that Hopgood, Dixon, and a person named Lye, carrying on business in partnership together, were known by the description of Hopgood & Co. All their transactions of buying and selling were carried on in that name; but Dixon, who was proved to be the manager of the whole business, was also in the habit of indorsing bills in the name of Hopgood & Fowler, by procuration, for the purpose of getting them discounted. The question then is, whether that sufficiently proves the existence of persons using, for the purposes of business, the style and firm of Hopgood & Fowler? At the trial I was at first inclined to yield to the objection, but afterwards altered my opinion. I still think that, as between third persons, there was sufficient evidence of an indorsement, by persons using the style and firm of Hopgood & Fowler; inasmuch as Dixon, the managing partner in the firm of Hopgood & Co., was in the habit of issuing bills into the world, indorsed under the former designation." See Faith *v.* Richmond, 11 A. & E. 339; Rogers *v.* Coit, 6 Hill, 322; Mifflin *v.* Smith, 17 S. & R. 165; Palmer *v.* Stephens, 1 Denio, 471; Tams *v.* Hetner, 9 Penn. St. 441; Le Roy *v.* Johnson, 2 Pet. 186.

(*i*) Perring *v.* Hone, 4 Bing. 32; Crouch *v.* Bowman, 3 Humph. 209. See Marshall *v.* Colman, 2 Jac. & W. 266; Kendrick *v.* Tarbell, 1 Williams, 512; *In re* Warren, Daveis, 320; Filley *v.* Phelps, 18 Conn. 294. In Lord Galway *v.* Matthew & Smithson, 1 Camp. 403, where the action was against the defendants as surviving partners, Lord Ellenborough *held*, that a note made in the following manner was sufficient on the face of it to bind the whole firm: "Sixty days after date, I pay Lord Viscount Galway, or order, 200*l.* value received. For J. Matthew, T. Whitsmith, and T. Smithson, J. Matthew." But this must of course proceed on the presumption that the names of all the partners, as subscribed by the partner acting for the firm, were to be considered the style of the firm until the contrary was proved. Caldwell *v.* Sithens, 5 Blackf. 99. In Norton *v.* Seymour, 3 M., G. & Sc. 792, the action was upon a note drawn in the following form: "Two months after date, we promise to pay," &c., and signed, "Thomas Seymour, Sarah Ayres," in the handwriting of Seymour. The defendant Ayres had formerly carried on business at the place at which the goods, in respect of which the above note had been given, had been supplied, and had admitted that she was in partnership with Seymour. A circular and invoice issued by Seymour were also in evidence; the circular stating that the business would in future be carried on in the names of Seymour & Ayres,

"A. & B." be the note of the firm. In either case, or almost any other, upon proof that the partnership was really the party in interest and under obligation, and that another style than that of the partnership was used through inadvertence or fraud, the partnership would be held liable; (*j*) but no signature other than their own would hold them as their signature. (*k*)

and the invoice being headed Seymour & Ayres. It was objected, on the part of the defendant Ayres, that, assuming the existence of a partnership between herself and Seymour, the latter had no authority to bind her by a bill or note signed otherwise than with the name of the firm. On motion for a new trial of the case, Manle, J., said: "As to the form of the note, it is to be observed that it is signed by Seymour in the name of himself and the other member of the firm. Suppose there was no authority so to sign it, other than the general authority conferred by the partnership, I should hesitate to say that one of two partners could not bind the other by signing the true names of both, instead of the fictitious name. That, however, is not the question here. The circular states that the business will in future be carried on in the names of Seymour & Ayres; that is, in the names of the two persons mentioned, whatever those names may be. Thomas Seymour is the name of the one, and Sarah Ayres that of the other. There is, therefore, sufficient evidence of a special authority to sign the note in those names, if such special authority were necessary."

(*j*) Kinsman *v.* Dallam, 5 Monr. 382; Crozier *v.* Kirker, 4 Tex. 252. In Faith *v.* Richmond, 11 Ad. & Ell. 339, Richmond, Barbour, & Hannay were in partnership, under the style of "The Newcastle & Sunderland Wall's End Coal Company." A promissory note was made by Richmond, signed as follows: "For the Newcastle Coal Company, William Richmond, manager. At the London and Westminster Bank." It was objected that, admitting Richmond to be entitled, as a partner, to make promissory notes on behalf of The Newcastle & Sunderland Wall's End Coal Company, yet this was not a note drawn in their behalf, and could not bind them; "The Newcastle Coal Company" not being their firm, nor the London & Westminster Bank one with which they dealt. The Lord Chief Justice, in summing up, observed, that the three defendants were partners, and Richmond might draw bills or notes as their agent; and that if he had done so in the name of The Newcastle & Sunderland Wall's End Coal Company, or if the plaintiff had been used to deal with them as the Newcastle Coal Company, the defendants would have been bound: but he left it to the jury to say, whether, on the evidence, the note in question was one which Richmond, as a partner in the first-mentioned firm, had authority to draw. A verdict being found for the defendants, the Court of Queen's Bench refused a rule for a new trial, on the ground of misdirection.

(*k*) "If, in the body of a promissory note, made by one partner, the language be, 'I promise to pay,' &c., but the note be signed with the copartnership name, such note is binding on the firm, and not alone on the partner who executed it." Doty *v.* Bates, 11 Johns. 544. But if an obligation on its face purports to be the act of one partner, and to be made to secure a debt due from him individually, the mere fact that the partnership name is signed to this instrument is not sufficient to bind the firm thereby. Scott *v.* Dansley, 12 Ala. 714. If a note be made as follows: "I promise to pay," &c., and be signed "For A.,

* 128 * Questions of this kind sometimes arise where partners in business do not advertise or in any public way make known the fact of partnership, but transact their business under the name of one of their partners only. (*l*) When parties agree to transact business jointly, or under an agreement to share in the profits, the name or firm which they use is arbitrary and conventional. They may use the name of both, or of one of them alone, or any distinct designation, by which all will be included and bound, as if their names were used. (*m*) But though the business of a copartnership may be transacted in the name of one partner, that partner alone cannot bring an action for the price of goods sold by the house. The other acting and ostensible partners must be co-plaintiffs. (*n*) And in assumpsit by a copartnership, the plaintiffs must prove who compose the firm. (*nn*) These questions are much complicated when this partner does business on his own account also, for then the signature may do nothing toward determining whether a purchase was made, or a bill accepted, or a note given by that individual alone, or by a partnership of which he was a member. All questions of this kind are questions of fact rather than of law. Nothing better can be said, perhaps, than that they must be answered accordingly as the evidence brings them under this or that general principle of the law of partnership. If, for example, the character of the goods purchased, the circumstances of the purchase, the use made of them, or

B., C., & D., A." or "By A.," it seems that the whole firm is liable thereon. Galway *v.* Smith, 1 Camp. 403; Hall *v.* Smith, 1 B. & C. 407; *Ex parte* Buckley, 14 M. & W. 469. Whether upon such a note there is a separate right of action against the executing partner, see *post*, p. * 199, *et seq.*

(*l*) The style of a copartnership may be the name of one of its members, *Ex parte*, Bolitho, 1 Buck, 100; South Carolina Bank *v.* Case, 8 B. & C. 427; Palmer *v.* Stephens, 1 Denio, 471; or of one who is not a partner, Bank of Rochester *v.* Monteath, 1 Denio, 402; Williamson *v.* Johnson, 1 B. & C. 146.

(*m*) Per Shaw, C. J., in Baring *v.* Crafts, 9 Metc. 392. And where the name of one partner is the style of the firm, that partner's name, with the addition of "& Co.," will not operate as the signature of the partnership. As where J. B. & C. H., carrying on business as partners under the name of J. B. & C. H., made and indorsed a bill of exchange in the name of "J. B. & Co.," *held*, that J. B. was not bound thereby. Kirk *v.* Blurton, 9 M. & W. 284. See Maclae *v.* Sutherland, 3 El. & Bl. 34, 35, 25 Eng. L. & Eq. 92, 110; Forbes *v.* Marshall, 11 Exch. 176, 180.

(*n*) Wilson *v.* Wallace, 8 S. & R. 53.

(*nn*) Patten *v.* Whitehead, 13 Richardson, L. 150. See Pursley *v.* Ramsey, 31 Ga. 403; Tilford *v.* Ramsey, 37 Mo. 563.

the circumstances attending the giving of the paper, or any or all of these, sufficiently indicate that * the transaction was in fact on account of the partnership, it will be held as the transaction of the partnership. (*o*) * 129

(*o*) *Ex parte* Bolitho, 1 Buck, 100. See Truman *v.* Loder, 11 Ad. & El. 593. In United States Bank *v.* Binney, 5 Mason, 176, the two Binneys and John Winship carried on business as partners, under the name and firm of "John Winship." By the present suit, it was attempted to recover of all the partners, as indorsers, upon certain promissory notes indorsed with the name of John Winship, and which had been protested for non-payment. Story, J., said: "In respect to the general and limited partnerships, the same general principle applies, that each partner has authority to bind the firm as to all things within the scope of the partnership, but not beyond it. Where the contract is made in the name of the *firm*, it will, *prima facie* bind the firm, unless it is ultra the business of the firm. Where the firm imports, on its face, a company, as A., B., & Co., or A., B., & C., then the contracts made by the partners in that name bind the firm, unless they are known to be beyond the scope and business of the firm. But where the business is carried on in the name of one of the partners, and his name alone is the name of the firm, then, in order to bind the firm, it is necessary to prove not only the signature, but that it was used as the signature of the firm by a party authorized to use it on that occasion and for that purpose. In other words, it must be shown to be used for partnership objects and as a partnership act. The proof of the signature is not enough. The plaintiffs must go farther, and show that it is a partnership signature. In the present case, the signature of "John Winship" may be on his individual account, or his personal contract, or it may be on account of the partnership. Upon the face of the paper it stands indifferent. The burden of proof, then, is upon the plaintiffs to establish that it is a contract of the firm, and ought to bind them." s. c. 5 Pet. 529; Manuf. & Mech. Bank *v.* Winship, 5 Pick. 11; Etheridge *v.* Binney, 9 id. 272; Buckner *v.* Lee, 8 Ga. 285; Mercantile Bank *v.* Cox, 38 Me. 500. But if the person whose name is adopted as the style of the partnership does not carry on a separate business, then that name, attached to a note or other obligation, will be presumed to be the signature of the firm. Bank of Rochester *v.* Monteath, 1 Denio, 402; Oliphant *v.* Matthews, 16 Barb. 608. See Mifflin *v.* Smith, 16 S. & R. 165. By the court, Johnson, J.: "It seems to be well settled, that where a partnership is carried on in the name of an individual, and a suit is brought against the partners upon a note or other obligation signed by such individual, the legal presumption is that it is the note of the individual, and not of the partners. And the plaintiff, in order to recover against the partners, must not only prove the execution of the note, but go farther, and prove, either that the money for which the note was given was borrowed on the credit of the partnership, or that, when obtained, it was used in the business of the partnership. If the individual whose name is used declares at the time of the transaction that it is on account of the partnership, that is sufficient to bind the partners. And it would seem, from an examination of the reported cases, that the legal presumption that the debt is the debt of the individual in whose name the obligation is made, and not of the firm, may be repelled and overcome by proof as to the business in which such person was engaged. Thus, in Mifflin *v.* Smith, 17 S. & R. 165, where it appeared that the usual and regular business of the borrower was on account of the partnership, and

* 130 * In all such cases, it must be remembered that the individual partner whose name is used, has, by law, full authority to represent and act for the rest, and use his own name as the name of the firm; and his representations in a matter of business which might be theirs bind them all, however fraudulent on his part. If, therefore, when he purchases goods, or gives a note, or offers a note for discount with his indorsement, he represents that he acts for the partnership, and the person with whom he deals believes honestly and rationally that he does so act, the partnership, and of course all the partners, are bound, although no name but that of the individual was used in the transaction.

The use of such a name as usually indicates partnership,

that no business was done by him on his own account, except an occasional speculation, it was *held*, that the transaction must be presumed to be on partnership account. So, in the case of South Carolina Bank *v.* Case, 8 B. & C. 427, where it appeared that the partners were Crowder, Clough, & Prefect, and the name of the firm in England was Crowder, Clough, & Co., but in their business in the United States the name of Clough alone was used, and that Clough, while he resided here, never traded, or drew or indorsed bills on his own account, but did on account of the firm, — it was *held*, "*under the circumstances*, that a bill indorsed here by Clough must be regarded as a bill indorsed by the firm." Manuf. & Mech. Bank *v.* Winship, 5 Pick. 11; Etheridge *v.* Binney, 9 id. 272; Bank of Rochester *v.* Monteath, 1 Denio, 402; Buckner *v.* Lee, 8 Ga. 285. In United States Bank *v.* Binney, 5 Mason, 189, where the two Binneys and John Winship were in partnership, under the firm and style of "John Winship," and the action was against all the partners, as indorsers upon promissory notes indorsed in the name of John Winship, Story, J., said: "The notes are all indorsed in the name of 'John Winship.' For aught, therefore, that appears on the face of them, they were notes only binding him personally. The plaintiffs must, then, go farther and show, either expressly or by implication, that these notes were offered by Winship as notes binding the firm, and not merely himself personally, as that the discounts were made for the benefit and in the course of the business of the firm. It is not sufficient for the plaintiffs to prove that the bank, in discounting these notes, acted upon the *belief* that they bound the firm, and were for the benefit and business of the firm. They must go farther, and prove that that belief was known to and sanctioned by Winship himself in offering the notes, and that he intentionally held out to them that the discounts were for the credit and on the account of the firm, and that his indorsement was the indorsement of the firm and to bind them; and that the bank discounted the notes upon the faith of such acts and representations of Winship. The jury will judge, from the whole evidence, how the case stands in these respects. The mere fact that the discounts so procured were applied to the use of the firm, is not, of itself, sufficient to prove that the discounts were procured on account of the firm. It is a strong circumstance, entitled to weight, but not decisive." See, to the same effect, the language of the court in Etheridge *v.* Binney, 9 Pick. 275. See also Oliphant *v.* Matthews, 16 Barb. 608.

while it may be *primâ facie* evidence of partnership, is slight and easily rebuttable. (*oo*)

Under the topic of the liability of a person as partner because he is so held out, a question arises which may be attended with some difficulty. If a person, who is not generally or publicly declared to be a partner, is declared with his consent to be a partner to one customer, and that customer communicates the fact to another, is the person thus disclosed to be held as a partner by this other * customer, if he be not a * 131 partner in fact? If he is a partner in fact, he is liable as such whenever he is discovered to be one, without any reference to the means or manner of the discovery, or the time, whether before or after the contract. But if, not being a partner, he is chargeable, if at all, because he is held out as one, can he be thus charged by one to whom he was not so held out by himself, or with his direct consent? The cases and principles which we have already considered in treating of a closely related question touch upon this also. (*p*) It seems, however, to be a distinct question. But though there are cases which touch on this, there are none that we are aware of which determine the question.

We suppose the answer must depend in each case upon the circumstances and manner of the first or original disclosure, and the intention of the parties therein. If the alleged partner, who is to be held only because he has loaned his credit, intended to lend it only to the very person and in the very transaction in which he made or permitted the disclosure, then he should not be held any further, unless through his own fault or negligence. Whatever was his original intention, and however limited it might have been, if he did not limit this giving of his credit in fact, he must be bound to all to whom the fact to which he gives circulation is afterwards communicated. If, on the other hand, he says to the customer, I am a partner as to you, but I tell you so in confidence, and you must not mention this to any person; and the customer mentions it, and with it the

(*oo*) Charman *v.* Henshaw, 15 Gray, 293.

(*p*) Shott *v.* Streatfield & Green, 1 M. & Rob. 9; Swan *v.* Steele, 7 East, 210; Berkom *v.* Smith, 1 Esp. 29; Fox *v.* Clifton, 6 Bing. 794; Carter *v.* Whalley, 1 B. & Ad. 11.

injunction of secrecy to another customer, the first one does what he had no right to do, and the second knows that the first had no right to do it, and therefore can acquire no right by receiving what he knew the giver had no right to give. If the second customer did not know that the first broke his promise in telling him, or, what is the same thing, did not know that the alleged partner gave no authority for being called a partner to him, it may be a more difficult question, whether he can hold this person as partner. But we think he can; because the innocent customer should be protected, rather than the guilty party, who might have effectually limited his credit by
* 132 * guaranty or the like, instead of putting it into a form by which others might be deceived.

Usually, the question whether one is liable as a partner because so held out by himself, or with his consent, turns upon the force and meaning of his acts. If his name is advertised, (*q*) or is on the painted signs over the door, (*r*) on the shop-bills or cards, (*s*) and he knows this and makes no

(*q*) In *Ex parte* Matthews, 3 Ves. & Bea. 125, the petitioner prayed that the joint commission against himself and John Matthews as partners might be superseded: and stated, that he, the petitioner, never was a partner, nor interested with John Matthews nominally or really in the property or profits of his trade, or any other trade; that he was merely the shopman to John Matthews, and not a trader; and that there was no pretence for supposing him a partner with John Matthews, except an advertisement in the Gazette, declaring the partnership between them dissolved; which advertisement was inserted for the purpose of counteracting a report that they were partners. The Lord Chancellor *held*, that upon the affidavits he could not possibly decide that there was no partnership; and, accordingly, that an issue must be directed to try that question.

(*r*) Williams *v.* Keats, 2 Stark. 290; Dolman *v.* Prichard, 2 C. & P. 104.

(*s*) Young *v.* Axtell, 2 H. Bl. 242; Gill *v.* Kuhn, 6 S. & R. 338; Benedict *v.* Davis, 2 McLean, 348. See further, for illustrations of the methods by which persons may exhibit themselves as partners, *Ex parte* Langdale, 18 Ves. 300, s. c. 2 Rose, 444; Bond *v.* Pittard, 3 M. & W. 357; Guidon *v.* Robson, 2 Camp. 302; Geddes *v.* Wallace, 2 Bligh, 296; Stearns *v.* Haven, 14 Vt. 540; Hicks *v.* Cram, 17 id. 449; Cottrill *v.* Vanduzen, 22 id. 511; Matthews *v.* Felch, 25 id. 536; Perry *v.* Randolph, 6 Smedes & M. 335; Chapman *v.* Wilson, 1 Rob. (Va.) 267; Mershon *v.* Hobensack, 2 N. J. 372; Smith *v.* Smith, 7 Fost. 244; Holmes *v.* Porter, 39 Me. 157; Barnett *v.* Smith, 17 Ill. 565; McMullan *v.* Mackenzie, 2 Greene (Ia.), 368; Chidney *v.* Porter, 21 Penn. St. 390. If A., wishing to get bills discounted, introduces B., as his partner, to C., but the only connection between A. and B. is in discounting bills, B. is not hereby so held out as a general partner with A. as to be liable for goods afterwards bought by A. of a person who had been informed by C. that A. and B. were partners. Berkom *v.* Smith, 1

objection, he is bound. But a person cannot be made liable as partner because so held out, unless the holding out is proved to have been with his concurrence. Hence the declaration or acts of A., implicating B. as his partner, while they bind the former, cannot affect the latter, without * some con- * 133 firmation by him. (*t*) As to public acts of this kind,

Esp. 29. See Ridgway *v.* Philip, 5 Tyrw. 131. A person is not liable as partner because so held out, who has signed his name to an instrument importing that the subscribers intend, upon the fulfilment of certain conditions, to carry on business in partnership. He has not thereby held himself out to the world as a partner in a company already formed. Bourne *v.* Freeth, 9 B. & C. 632. Nor is one who has retired from a firm, and given due notice thereof, liable as a partner to third persons for goods supplied to a ship, because, having before retirement defectively conveyed his interest as a partner therein, his name appears on the ship's register down to a period subsequent to the delivery of the goods, when he joins with the assignees of the other partners in making a good title thereto to their vendee. M'Iver *v.* Humble, 16 East, 169. See Hoare *v.* Dawes, 1 Doug. 371.

(*t*) Whitney *v.* Ferris, 10 Johns. 66; McPherson *v.* Rathbone, 7 Wend. 216; Jennings *v.* Estes, 16 Me. 323; Thornton *v.* Kerr, 6 Ala. 823; Tuttle *v.* Cooper, 5 Pick. 414; Anderson *v.* Levan, 1 Watts & S. 334; Taylor *v.* Henderson, 17 S. & R. 453. See Matthews *v.* Felch, 25 Vt. 536; McBride *v.* Protection Ins. Co., 22 Conn. 248, 259. In Fox *v.* Clifton, 6 Bing. 776, 4 Moore & P. 713, the action was brought by the plaintiff for goods sold and delivered and for work and labor done, upon a contract made, not with the defendants personally, but with the chairman and directors of the "Imperial Distillery Company." It was contended, that the defendants had allowed themselves to be held out as partners in this company, upon the following evidence, as stated in the opinion of the court: "The secretary of the company had prepared a book containing a list of the names of all those persons to whom shares had been allotted in the concern, in which list the names of the seven defendants had been included. This list had been left with the bankers of the company, to enable them to receive the deposits from the contributors, upon which list the payments had been made, and receipts given at the banking house; and a copy of it was lying upon the table of the counting-house belonging to the company, where it was seen by the plaintiff when he called upon the subject of the contract; and on one occasion, when the plaintiff was expressing a doubt about trusting such a numerous company, the secretary opened the book, and the plaintiff looked over some of the names. The book itself, when referred to, contained lists, on the different pages, of the names of the several persons to whom shares had been allotted, arranged alphabetically, one leaf being assigned to each letter of the alphabet, and the whole number of names consisted of upwards of two hundred; so that merely opening the book in the counting-house, and seeing some of the names, could not, in the ordinary course of things, give any intimation to the plaintiff that the names of the seven defendants were included in the lists. Indeed, it is not argued on the ground that the plaintiff saw the names of the defendants in this list, but that the bare circumstance that their names were included in such list used for the purpose above specified, by their own permission, was a sufficient holding themselves out to the world as partners in the company. But, in the first place, there was no evidence that the defendants knew of the existence of any copy of the list at the counting-

* 134 there is some presumption that he knows and * permits them; and he can escape the liability only by proving his want of knowledge and consent. (*u*)

If he knew, and neither consented nor refused, nor took any steps in relation to it, then he would be held as consenting; for he is in fault, and he should suffer rather than the wholly innocent persons whom he permits to be deceived. And if he does something in the way of objecting, the question then is, What, and how much? (*v*) and we take the only rule to be, that if he is held out as partner, and knows it, he is chargeable as one, unless he does all that a reasonable and honest man should do, under similar circumstances, to assert and manifest his refusal,

house; still less, any evidence that such list was made up, or shown to any one, with their permission or knowledge. The holding one's self out to the world as a partner, as contradistinguished from the actual relation of partnership, imports at least the voluntary act of the party so holding himself out. It implies the lending of his name to the partnership; and is altogether incompatible with the want of knowledge that his name has been so used. Thus, in the ordinary instances of its occurrence, when a person allows his name to remain in a firm, either exposed to the public over a shop door, or to be used in printed invoices or bills of parcels, or to be published in advertisements, the knowledge of the party that his name is used, and his consent thereto, is the very ground upon which he is estopped from disputing his liability as partner. That there must have been a list of the subscribers to so numerous a company, the defendants may, indeed, be taken to have known: it would have been impossible to make calls for deposits, to give notices, or to do any of the acts necessary for carrying on the concern, without a written list of the names of the subscribers. So far, therefore, the authority of the defendants to the existence of a list may be assumed. But that implies no authority whatever that a copy should be made out and lie in the counting-house, for the purpose of being shown to strangers who might demand to look at it. And still less could the list left with the bankers be considered as making any communication to the world, with the assent of the defendants. That list was a matter in strict confidence and privity between the banker who received the money, and the party who called with the letter in his hand and paid the deposit. It held out no information to the public, because not communicated to any other third person whatsoever. Even upon the face of the book itself, it contained no information of the relation in which the parties stood to each other; ————. But, without reference to the information which the plaintiff actually received from the book, we think the communication of this book was no act done by the defendants themselves, or by their authority or permission, so as to make them nominal and ostensible partners, in contradistinction to real partners or sharers in the profits of the concern."

(*u*) See cases cited in four preceding notes.

(*v*) As in the case of a retiring partner, who, it seems to be settled, must notify the dissolution to the public by proper advertisements, and, perhaps, to customers by a particular notice. Newsome *v.* Coles, 2 Camp. 617. See Leavitt *v.* Peck, 3 Conn. 124. See also *post*, ch. 13, § 2.

and thereby prevent innocent parties from being misled. If he does any thing which might fairly produce the impression that he is a partner, or, when another does this, fails to do what he should to remove or prevent this impression, then he is as much liable as if he calls himself a partner.

If one is chargeable as partner because so held out, he may be treated as one, not only by being made responsible, but by being joined with the partners in a suit against them, or in a suit by them. (*w*) So, if a contract be made with persons as partners, * they may sue or be sued as part- * 135
ners, whether they are so in fact or not. (*x*) Where there is a partnership as to third parties, the law presumes a partnership as between themselves. (*y*) But, if one sues a firm, he is not compellable to join a person who is not a partner, merely because he is held out by a partner to be one. (*z*)

(*w*) That a nominal partner may be joined in a suit against the other partners, is shown by almost every case in which this liability of a nominal partner is tested. See Goode *v.* Harrison, 5 B. & Ald. 156. That one held out as partner may be a coplaintiff in a suit with the other partners, see Guidon *v.* Robinson, 2 Camp. 302; Kell *v.* Nainby, 10 B. & C. 20. In Smith *v.* Sherwood, 10 Jur. 214, A. filed a bill for an account against B. & C., alleging himself a partner with them. B. & C., in their answer, denied the existence of the partnership, and stated that the plaintiff was their foreman, whom they had contemplated taking into partnership, and whom, therefore, they had allowed to hold himself out as their partner in many ways. They admitted that the accounts had been made out in the name of B., C., & A.; that, in a certain specification of buildings required by them, the buildings had been described as the property of B., C., & A.; and also, that they had served A. with a notice to dissolve partnership. The Vice-Chancellor *held*, that there was sufficient proof of the existence of a partnership between B., C., & A. [Such a partner may also be made a bankrupt as a member of the firm. *Re* Krueger, 2 Lowell's Decisions, (Dist. Ct. U. S.), 66.]

(*x*) Bond *v.* Pittard, 3 M. & W. 357.

(*y*) Lord Ellenborough in Peacock *v.* Peacock, 2 Camp. 45.

(*z*) In Guidon *v.* Robson, 2 Camp. 302, Lord Ellenborough *apparently held*, that a merely nominal partner, not only *might* join with the other partners in a suit, but in some cases was even a *necessary* party. There, the action was by Guidon alone against Robson, upon a bill of exchange, drawn in the name of Guidon & Hughes upon Robson, and by him accepted. Hughes was simply a clerk of Guidon. Lord Ellenborough: "There being such a person as Hughes, I am clearly of opinion that he ought to have been joined as a partner. He is to be considered in all respects a partner as between himself and the rest of the world. Persons in trade had better be very cautious how they add a fictitious name to their firm, for the purpose of gaining credit. But where the name of a real person is inserted, with his own consent, it matters not what agreement there may be between him and those who share the profit and loss. They are equally responsible, and the contract of one is the contract of all. In this case, the declaration states that the defendant promised to pay the money specified in the bill, to the plaintiff only, whereas

Much the greater number of cases relating to the liability of one held out as a partner turn upon the rights and duties of a retiring partner, and will be considered when treating of that subject.

SECTION VI.

OF LIABILITIES ARISING FROM ANNUITIES, LOANS, LEASES, OR TRUSTS.

A person may be in receipt of a sum from the profits of a partnership, without being chargeable as a partner, when one is entitled to an annuity from the firm. This happens most frequently in the case of a retiring partner, who as a part of his several property, or instead of some portion of his share in the partnership property which he leaves behind, is to receive an annuity for life, or for a certain number of years. This may occur also by the bequest of a deceased partner, who leaves his funds or a part of them in the firm, and gives an annuity to his widow or some other person out of the profits. It is agreed that if this annuity be certain, and in no way dependent on the amount of the profits, although payable out of them, then the annuitant is not a partner. (*a*) And, if Lord Eldon's rule was

she promised to pay it to the plaintiff jointly with another person. The variance is fatal." But in Teed *v.* Elworthy, 14 East, 210, where the banking business was carried on in the name of John Teed (the father of the present plaintiff), Thomas Teed & Co. being the firm in whose joint names the banking accounts were kept, a suit being brought by John Teed alone against a customer, for the balance of an overdrawn account, Lord Ellenborough said: "*Supposing the plaintiff could sue alone in this case, by showing* that he alone was the proprietor of the funds of the bank, and that the son had no interest as a partner in this account with the defendant, although the account was kept with the defendant in the joint names of the father and son; yet these facts ought to have been distinctly proved at the trial, which they were not, and *therefore* the plaintiff has not entitled himself to recover alone in this case." And in Parsons *v.* Crosby, 5 Esp. 199, the same judge *held*, at *nisi prius*, that, in an action by the real party in interest, the nominal partner might be called as witness for the plaintiff. See also Davenport *v.* Rackstraw, 1 C. & P. 89; Harrison *v.* Fitzhenry, 3 Esp. 238; Glossop *v.* Colman, 1 Stark. 25; Kell *v.* Namby, 10 B. & C. 20; *Ex parte* Watson, 19 Ves. 461; Kieron *v.* Sanders, 6 Ad. & El. 515; Allen *v.* White, Minor, 365. See Story on Part. § 242, notes and cases cited.

(*a*) See Young *v.* Axtell, 2 H. Bl. 243. In Waugh *v.* Carver, 2 H. Bl. 235, Lord Chief Justice says: "This case has been extremely well argued, and the discussion of it has enabled me to make up my mind, and removed the only difficulty I felt, which was, Whether, by construing this to be a partnership, we should not determine

relied on, it would probably be held that, if the annuity were to be a sum of money equal to a certain proportion of the profits, this would not cast upon the receiver the liabilities of a partner, while it would have this effect if it were described as the same proportion of the profits. But we think the rule of as little value in this case as in those to which it has been usually applied. The question must still be, Has the annuitant, by the terms of the agreement or the bequest, an interest or ownership in the property or the profits of the firm while they are undivided, or only a right to require that the profits should be determined and divided *in a proper way and at a * 137 proper time, and a certain part of them delivered to him; and may he have his action against the partnership, if this be not done? In this case, he is not a partner in any respect whatever. (*b*)

that if there was an annuity granted out of a banking-house to the widow, for instance, of a deceased partner, it would make her liable for the debts of the house, and involve her in a bankruptcy? But I think this case will not lead to that conclusion." So in Grace *v.* Smith, 2 W. Bl. 1001, Blackstone, J., said: "I think the true criterion (when money is advanced to a trader) is to consider whether the profit or premium is certain and defined, or casual, indefinite, and depending on the accidents of trade. In the former case, it is a *loan* (whether usurious or not, is not material to the present question); in the latter, a partnership." See also *Ex parte* Colbeck, Buck, 48.

(*b*) The cases on this point are not very numerous; nor do they, we think, give any strong support to Lord Eldon's rule. In Bloxham *v.* Pell, 2 W. Bl. 999, Pell, for leaving money in a firm, was to receive not only an annuity, with a right to inspect the partnership books, but also the usual rate of interest. It was, therefore, considered by Lord Mansfield that he must be a partner; as otherwise he would be a usurious lender, which it could not lie in his own mouth to say. Nor is Grace *v.* Smith, 2 W. Bl. 998, to be regarded as conclusively settling the rule, that the perception of an indefinite proportion of the profits of a trade, in return for money invested or left therein, necessarily makes one a partner. There Smith & Robinson dissolved partnership. The terms of the dissolution were, that all the stock in trade, debts, &c., of the partnership, should be carried to the account of Robinson only; that Smith was to have back 4,200*l.* which he brought into the trade, and 1,000*l.* for the profits then accrued; that Smith was to lend Robinson 4,000*l.*, part of this 5,200*l.*, or let it remain in his hands for seven years, at five per cent interest, and an annuity of 300*l.* per annum, for the same seven years. For all which Robinson gave bond to Smith. De Grey, Chief Justice: "The only question is, What constitutes a secret partner? Every man who has a share of the profits of a trade ought also to bear his share of the loss. And, if any one takes part of the profit, he takes part of that fund on which the creditor of the trader relies for his payment. If any one advances or lends money to a trader, it is only lent on his general personal security. It is no specific lien upon the profits of the trade, and yet, the lender is generally interested in

* 138 * It has been thought, in some cases, that the question whether an annuitant or lender of money was or was

these profits: he relies on them for payment. And there is no difference whether that money be lent *de novo*, or left behind in trade by one of the partners who retires. And whether the terms of that loan be kind or harsh, makes, also, no manner of difference. I think the true criterion is, to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund for payment, — a distinction not more nice than usually occurs in questions of trade or usury. The jury have said this is not payable out of the profits; and I think there is no foundation for granting a new trial." Now, as we have already seen [see p. *71, note (*l*)], the language of De Grey above quoted is by no means authority for the rule in question. The distinction there taken is, not between sharing *definitely* and sharing *indefinitely* in the profits of a trade, but between *sharing them at all*, and only relying on them as a fund of payment. And as applied to the case of money put into a firm, by which example the Lord Chief Justice illustrates his criterion, the distinction is between lending money on the general personal security of the trader, and lending it in such a way as to acquire a specific lien upon the profits. By which lien, as we have endeavored to show in another place, is meant nothing more than a proprietary interest in the profits of a trade while they remain profits; that is, before division. Blackstone, Justice, however (of the same opinion), said: "I think the true criterion (when money is advanced to a trader) is to consider whether the profit or premium is certain and defined, or casual, indefinite, and depending upon the accidents of trade. In the former case it is a loan (whether usurious or not, is not material to the present question); in the latter, a partnership. The hazard of loss and profit is not equal and reciprocal, if the lender can receive only a limited sum for the profits of his loan, and yet is made liable to all the losses, all the debts contracted in the trade, to any amount." Now, Mr. Justice Blackstone agrees with the Chief Justice. By this it may be meant that he concurs both in the result and in the grounds of his opinion. It is certain, however, that the two opinions have always been regarded as entirely harmonious; and we may, therefore, so consider them. If so, then Mr. Justice Blackstone's criterion signifies the same thing as Chief Justice De Grey's. Accordingly, Chief Justice De Grey's criterion must be regarded as the expression of the general principle of which Mr. Justice Blackstone's is merely the specific application. That is, while Chief Justice De Grey asserts as the universal principle, that to be a partner one must have a specific interest in profits, as profits, Justice Blackstone brings down that principle to the case in hand, by adding that where money is loaned to a trader, whether or not the lender has this specific interest in profits, as profits, will be determined by inquiring whether the return he is to receive for his money is definite and certain, or casual and depending on the accidents of trade. The opinions of the two judges, then, uniting on the general doctrine, the precise difference between them seems to be in the influence which they give to the fact of an indefinite participation in profits; Mr. Justice Blackstone considering that, if a loan is made, and the return therefor is to depend upon the profit and loss of the borrower, that one circumstance alone is sufficient to make him a partner. If this be his view, we think he stands alone. At least, there is no evidence that the other judges agreed with him, while some of the language used by Chief Justice De Grey would certainly seem to lead to

not a partner, might *depend upon the prior question, *139
whether the annuity or payment were to be made "in lieu of profits." If they were expressly so made, the party could have no interest in profits who had expressly agreed to receive something instead of them; and therefore he could not be a

a different conclusion. And if we suppose Justice Blackstone to have agreed with Chief Justice De Grey as to the rule of law, that a partner must have a specific interest in profits, as profits, then, sharing indefinitely in profits is simply a fact from which with all the other facts of the case it is to be determined whether such participator has that specific interest. But it is not identical with nor the same as that specific interest. The circumstance of sharing casually in profits, as we have already seen, may be a strong symptom of partnership; but it is not necessarily conclusive. Nor is there any reason for considering that circumstance more conclusive in case of a loan (to which Blackstone, J., applies it), than in any other. The fact that the consideration of a loan is a certain proportion of the profits of a trade is only one among other circumstances, from all which put together it must be decided whether there is established that specific interest in profits, as profits, which is necessary to make the lender a partner. Perhaps, if the latter part of Mr. Justice Blackstone's opinion, in which he appears to suggest a reason (evidently an equitable one) for the rule he lays down, be considered in connection with and as the basis of his criterion, the conclusion may not, after all, be inconsistent with this view. We do not consider, therefore, the case of Grace *v.* Smith to be one which gives any strong support to the rule, that the lender of money, who is paid by a certain proportion of the profits of a business, is necessarily a partner with the trader to whom he lends. Nor is much more force added to the doctrine by the inclination of Lord Mansfield's opinion, in Young *v.* Axtell, 2 H. Bl. 242; that Mrs. Axtell, who, beside an annuity, received 2*s.* per chaldron on all the coal sold, by the other defendant, to customers of her recommendation, was therefore a partner with the other defendant, because that payment would be increased in proportion as she increased the business. In the matter of Colbeck & Co., 1 Buck, 48, John Holdsworth assigned all his share of the partnership trade and premises to Colbeck & Ellis, his partners, upon trust, to pay an annuity of 50*l.* a year to himself for life, and after his death to his wife for life, &c. And it was also stipulated, that if the proceeds of John Holdsworth's share should not be sufficient to pay the annuity of 50*l.* a year, then that it should abate proportionably; or, on the other hand, if his share so assigned should amount in value to 5,000*l.*, that then the annuity should be increased to 100*l.* After the execution of the deed, John Holdsworth retired from the concern, but the style of the firm was not altered. The opinion of the Lord Chancellor was to this effect: "As to John Holdsworth, he certainly must be taken to have retired from the business, reserving *an interest in the profits of the trade;* for the annuity he reserved was not merely an annuity the amount of which was calculated with reference to the then present profits, but it was to be paid *out of the profits,* and to be subject to abatement and enlargement as the profits might fluctuate. His partnership, therefore, was never determined." See *Ex parte* Wheeler, Buck, 25; *Ex parte* Chuck, 8 Bing. 469. See opinion of Master of Rolls, *In re* Stanton Iron Works, 21 Beav. 164, cited *ante,* p. *41, note.

partner. We apprehend, however, that these words, or any equivalent words, would not suffice to shield from liability as partner one who was so by the whole intent and meaning of the bargain. If one stands in such a relation to a firm that he has a definite interest in the profits as they accrue, he is a partner, although he may agree to receive his share of the profits in a certain way; and this may be the only meaning and effect of the phrase, "in lieu of profits." (*c*) A similar view may be taken of the circumstances of a longer or shorter duration of the annuity. (*d*)

(*c*) See in Fereday *v.* Hordem, Jacobs, 144, an instance of an actual partnership, in which one of the partners receives for his contribution to the common stock an assured sum in lieu of profits.

(*d*) If, at the inception of a joint enterprise by A., B., & C., in which A. finds capital, it is agreed that A., for his contribution thereto, is to receive an annuity, the term of that annuity, whatever it may be, would seem to agree equally well with A.'s being either a partner or simply a lender of money. If, into a partnership already formed, A. puts money, or, apparently retiring therefrom, leaves money behind, for which he is to receive an annuity, to endure as long as the other partners, B. & C., shall continue in trade, — this identity in the duration of the business in which B. & C. are engaged, and of the annuity A. is to be paid, is undoubtedly consonant, for many obvious reasons, with A.'s being a partner with B. & C. But it seems no less consistent with the supposition that A. is merely a lender of money to B. & C., the loan to continue for a time commensurate with the occasion for it; that is, so long as B. & C. carry on a joint business. But suppose that, in a similar case, A. is to receive from B. & C. an annuity in duration entirely independent of the continuance of the joint business; it may, perhaps, be safely allowed that the circumstance that A.'s annuity is not dependent upon the existence of the partnership between B. & C. raises a presumption that his contribution to the funds of the firm has not made him their partner. But inasmuch as the question is, whether there is not a partnership between A., B., & C., the fact that B. & C. have agreed that they will be partners for a certain length of time can at most be only *primâ facie* evidence, open to rebuttal, that they have not since formed a new partnership with A. for a different length of time. That is to say, B. & C. being in partnership for a certain length of time, if A. puts money into the firm, in consideration of an annuity, or a different length of time, this difference may, in the absence of other facts, give the contract the appearance of a simple loan. But there may be other circumstances in the case, putting a different face on the agreement, and showing A. to have, in intent and in act, really become a partner. Then, notwithstanding the difference between the term of A.'s annuity and of the original partnership between B. & C., there can be no doubt that a jury might and should find the three to be partners. If, then, the effect of these two facts, — an annuity expressed to be in lieu of profits, and an annuity to continue for a period not at all affected by the duration of the partnership, — when they occur singly in a case, is not conclusive against the supposition of the annuitant's being a partner, what effect is to be given to them occurring conjointly? That is, A. investing money with B. & C., who are partners, for no matter what length

* If money be lent to a firm for more than legal inter- * 140
est, this * would be a usurious loan, (*e*) but would not * 141

of time, is to receive, for the use thereof, during a shorter or longer period, an annuity in lieu of a share of the profits of the business. Upon these facts is A *necessarily* a lender of money merely, and not a partner? Undoubtedly, without strongly opposing evidence, he might and should be found merely a lender of money to the firm of B. & C. But, notwithstanding A.'s annuity is said to be in lieu of a share of the profits, and is independent, in point of duration, of the partnership of B. & C., still, we think, the arrangement between B. & C. may be shown to be superseded by one by which, for the term of A.'s annuity, A. is to have a specific interest in profits, as profits, with B. & C. That is, notwithstanding the bearing of these facts to the contrary, since they are neither of them absolutely inconsistent with the existence of an actual partnership, other circumstances may justify the jury in finding that A. has, in reality, though perhaps unintentionally, acquired the rights, and therefore become subject to the liabilities, of a partner.

We think the decision in the case which approaches nearest the one we have above supposed is to be supported on this ground, if at all. We refer to Bloxham *v.* Pell, cited in Grace *v.* Smith, 2 W. Bl. 999. In this case

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(*e*) Gestons *v.* Brooke, Cowp. 793; Parker *v.* Ramsbottom, 3 B. & C. 257. When the principle is at hazard, there can be no usury. Accordingly, in Morse *v.* Wilson, 4 T. R. 353, where the lender of money was to receive a share of the profits of a trade in addition to legal interest, and to be liable to no losses, it was contended in his behalf that the contract was not usurious, inasmuch as, by sharing in the profits, he was liable to creditors for all the partnership debts, and thus his principal was in hazard. But Lord Kenyon, C. J., said: "Nothing can be clearer than this case. The plaintiff, without having any partnership in contemplation, lent 2,000*l.* to H. Wilson, for which he was to receive not only 5*l.* per cent interest, but also such surplus profits as should arise from these two shares in the business, he himself not being bound, on the other hand, to make good to the partners any part of the losses which the trade might sustain. The simple question is, Why, then, this is not an agreement to receive more than the 5*l.* per cent allowed by law for the forbearance of a loan? Most unquestionably it is; and it is therefore void. It has been argued, however, that this was not an usurious contract, because the principal was put in hazard, as it was liable to the partnership creditors: but it was no farther hazarded than in the case of every other loan, namely, by the risk of the borrower's insolvency; for, as between the plaintiff and the partners in the business, he was not liable to contribute to the losses in the trade." Buller, J.: "In this agreement provision is made to receive the profits, but none to engage for the losses, of the trade. And, therefore, it is not true that the plaintiff's principal was at stake; since, by the terms of the contract, the trade is to be carried on by the other partners, and the plaintiff is only liable to make good the losses of the trade in the event of the insolvency of the other partners. But, as between these parties, if there be any losses, they must be borne by the defendant and the other partner; and, if there be any profit, the plaintiff is to receive his proportion of it." On the other hand, in Morisset *v.* King, 2 Burr. 891, a stipulation between the parties, by which the person advancing money to a trader was to be liable for a moiety of the losses by the trade, seems to have determined the court in holding the transaction not to be usurious.

make the lender a partner. If it be lent to the firm, and the lender is to receive a certain share of the profits, this might be regarded as a contribution to the funds of the firm, and a joining of it in the character of a silent partner, and the lender might then incur the liability of a partner. In the case of a loan of money to a firm, the lender to have a certain proportion of the profits, the party must, as in every other case, have a specific interest in the profits, as profits, or he cannot be held as a partner. (*f*) So it would be if he were to receive a

there was a partnership, for seven years, between Brooke & Pell, but, at the end of one year, agreed to be dissolved, though no express dissolution was had. The agreement recited, that Brooke, being desirous to have the profits of the trade to himself, and Pell being desirous to relinquish his right to the trade and profits, it was agreed that Brooke should give Pell a bond for 2,485*l.*, which Pell had brought into the trade, with interest at five per cent, which was accordingly done. And it was further agreed, that Brooke should pay to Pell 200*l.* per annum for six years, if Brooke so long lived, as in lieu of the profits of the trade; and Brooke covenanted that Pell should have free liberty to inspect his books. Hereupon, Lord Mansfield *held*, that Pell was a secret partner; that, if there was not a partnership, there was crime; and that it should not lie in Pell's mouth to say, "It is usury, and not a partnership." But, laying aside the question of usury, there are facts in the case from which, perhaps, notwithstanding the annuity received in lieu of profits, and to last independently of the continuance of the business, it might well have been inferred that Pell was a partner. In the first place, Pell had the right, generally, at least, appertaining only to a partner, of inspecting the concern's books. Moreover, the clause of the agreement by which Pell becomes entitled to an annuity of 200*l.* a year, "as in lieu of the profits of the trade," seems to admit and to imply Pell's claim to interest in those profits, and, in one view of it at least, to be only a stipulation by which the amount of Pell's ultimate share therein is fixed, and not one by which his interest is changed or diverted. The remarks of counsel upon this case, in Grace *v.* Smith, are not inapt in this connection. "Grose & Adair, for the defendant, argued that the present case is very distinguishable from that of Bloxham *v.* Pell. Pell was to be paid out of the profits of the trade, as appears from the covenant to inspect the books, which else would be useless. His annuity was expressly given as in lieu of those profits. It was contingent in another view, as it depended on the life of Brooke, by whom those profits were to be made.

(*f*) It is entirely possible that a loan may be made for a proportion of the profits under circumstances which will not give the lender this specific interest, and will not therefore make him liable as a partner. But we consider the preceding proposition of the text a correct expression of the general rule, as that may be implied from the authorities as they now stand. See Morisset *v.* King, 2 Burr. 891; Gestons *v.* Brooke, Cowp. 793; Elgie *v.* Webster, 5 M. & W. 518; Bailey *v.* Clark, 6 Pick. 372; Oakley *v.* Aspinwall, 2 Sandf. 7; Conkling *v.* Washington University, 2 Md. Ch. 497; Drake *v.* Rhodes, 3 Rich. 37. It has been said that an agreement by which parties covenant to become partners, one of them to put in a certain amount of capital, and to receive for his share of the profits a certain fixed sum (with the payment of which all the property of the concern is charged), but not to be liable for any of the partnership debts, is not void on the ground

certain amount * of interest, legal or otherwise, and in * 142
addition thereto a share of the profits. (*g*)

It is possible that a contract of this kind might be usurious as to some parties, and an entering into copartnership as to others. If, for example, the lender was to receive legal interest, and also a share of the profits, it seems to be settled that, if he sued the partnership for the profits, they could defeat his claim on the ground that it was usurious. And yet it would seem to rest on some authority, that a lender on such terms might be held liable as a partner by the creditors of the firm. (*h*)

We should hold the test of partnership to be, in this case, that which we have repeatedly stated and endeavored to illustrate. Has the party lending or contributing the money acquired by his bargain a proprietary interest in the profits while they remain undivided? If he has, he is liable as a partner; otherwise, he is not so liable. (*i*)

of usury. The deed must be taken to disclose the real intentions of the parties, who are thereby made partners, though of a peculiar kind. Fereday *v.* Hordem, Jac. 144; Gilpin *v.* Enderbey, 5 B. & Ald. 954. See Brophy *v.* Holmes, 2 Molloy, 1; Anderson *v.* Maltby, 2 Ves. Jr. 248; *Ex parte* Chuck, 8 Bing. 469.

(*g*) See last note. Young *v.* Axtell, 2 H. Bl. 242; Morse *v.* Wilson, 4 T. R. 353, and *supra*, note (*e*); 17 Ves. 405; Bloxham *v.* Pell, cited in Grace *v.* Smith, 2 W. Bl. 999, and *supra*, note (*c*).

(*h*) Bloxham *v.* Pell and Grace *v.* Smith, 2 W. Bl. 998, 999; Morse *v.* Wilson, 4 T. R. 353; *supra*, note (*e*); *Ex parte* Briggs, 3 Dea. & Ch. 367. In this last case, A. borrowed of B. 230*l.*, with which to begin business, on interest at five per cent per annum. A. afterwards agreed to pay in addition, for the use of the money, one-eighth of the annual profits of the business, by monthly instalments, which he accordingly did for several months, B. giving receipts on account. *Held*, that the balance of the principal and interest due from A. was a good petitioning creditors' debt, not arising out of a partnership nor tainted by usury. See Bailey *v.* Clark, 6 Pick. 372; Sheridan *v.* Medara, 2 Stock. 478.

(*i*) Some confusion appears to have arisen on this point, from not considering to what parties the defence of usury is limited, and the practical effect of such limitation. Clearly, the borrower may plead it against the lender; and, as clearly, the lender cannot make use of it against a third party seeking to charge him as a partner; for he cannot take advantage of his own wrong. Suppose A. & B. to be in partnership, and C. to loan them money in consideration of a share of the profits, or legal interest as well as a share of the profits. We do not think that upon these facts the law could be said to regard C. as a usurer with respect to A. & B., and as a partner with respect to their creditors; and for the simple reason, that the same circumstances which would show C. to be merely a lender of money as to A. & B. would also show that he had not that specific interest in profits, as profits, which alone could make him a partner as to the creditors of A. & B. And this is evident if we lay out of view altogether the question of usury. But

*143 *It is, however, possible that the question of the liability of the lender of money to a partnership would be dealt with more severely than that of one receiving wages, or *quasi* wages, or even an annuity from a firm. For any loan of money which entitles the lender to share in the profits would be more easily held to constitute him a partner.

There are two classes of contracts by which profits are to be divided between the parties, which do not, however, constitute them partners, for reasons of a peculiar nature, perhaps, and not of general application. One of these is where an owner of a farm lets it on half profits. Here the landlord and *144 tenant certainly are *not partners; (*k*) for if we sup-

this may be said: If, in such a case, C. sues A. & B. to enforce the contract he has made with them, they may successfully resist his claim by showing that the transaction was really a usurious loan. On the other hand, if the creditors of A. & B. seek to fix C. as a partner, he cannot defend by proving the usury, but must avoid liability as a partner in some other way. That is: C. has made a bargain with A. & B. which is clearly illegal, because against the statute respecting usury, but yet is only a contract of loan. But if it is sought to charge C. as a partner through this very contract, he cannot defend by showing the real nature of the transaction. It of course then becomes exceedingly difficult for C. to show that, notwithstanding his contribution to the joint capital, and his participation in profits, he is not a partner. — But this is a difficulty in practice, and not one of principle. It must still be true, that, as matter of principle, a man cannot be charged as a partner without proving him to have a specific interest in profits, as profits. And this principle is not at all invalidated by the consideration, that there are cases in which a man may be held a partner simply because, by his own illegal acts, he has precluded himself from setting forth the real nature of transactions which, in the absence of such proof, appear justly to fix him with the character and liabilities of a partner. Hence, if A. & B. are partners, and C. loans them money for a share of the profits, it may be true that, in a suit by C. against A. & B., C. may be made out a usurer; and that, in a suit by the creditors of A. & B., he may be made out a partner. But this is a very different thing from saying that, upon the same state of facts, the law may hold C. a usurer as to A. & B., and a partner as to their creditors. The truth is, that the state of facts in the two cases is not the same. In the suit between C. and A. & B., all the facts appear; while in the suit by the creditors of A. & B. against C., as a partner, only so much of them appears as is sufficient to raise the presumption of a partnership, C. being unable to rebut this presumption by any evidence disclosing his usury. It is not strange, therefore, that, in such a case, he should be found a partner.

(*k*) Perrine *v.* Hankinson, 6 Halst. 181. Here, the profits of a tavern, as well as of a farm, were to be divided. Putnam *v.* Wise, 1 Hill, 234; Blue *v.* Leathers, 15 Ill. 31; Chase *v.* Barrett, 4 Paige, 148. The lease of a ferry has been considered analogous to a farming lease, and a stipulation by which the lessee thereof was to divide with the lessor all the profits above a certain amount was *held* not to make the lessor and lessee liable as partners. Bowyer *v.* Anderson, 2 Leigh, 550. So, when coal mines were leased. Heckert *v.*

pose the tenant should go into great expense for some new mode of cultivation, and become insolvent, no one would think of calling on the landlord as liable on the tenant's contracts. So, in the very common case of shipments on half profits, it is never supposed that such a shipment makes a partnership between the shipper and ship-owner; (*l*) and

Fegely, 6 Watts & S. 139, 143. In Tibbalts *v.* Tibbalts, 6 McLean, 80, John W. Tibbalts, and Ann Tibbalts, his wife, leased unto Leo Tibbalts a stock farm under covenants and conditions substantially as follows: The said Leo to pay no rents during the term of the lease, and to manage and conduct the business of the farm in accordance with his own judgment; the stock and farming utensils on the farm at the time of the lease to be fairly valued, and at the end thereof to be accounted back in equal value; Leo to have one-third, and John W. Tibbalts and wife two-thirds, of the net profits to accrue by the same, and current expenses to be paid out of the general stock funds of the concern. The real estate tax was to be paid by John W. Tibbalts, and six per cent interest to be allowed on all advances made by either of the parties. Leo was to keep regular accounts of the business of the farm, subject at all times to the inspection of John W. Tibbalts and wife; and, in case of Leo Tibbalts's death during the term of the lease, peaceable possession was to be given to John W. Tibbalts and wife. The court *held*, that "looking at the nature of the above contract, and the language used by the parties, there was less difficulty in considering it a partnership agreement, than a mere lease for the term specified, paying rent." See also Brownlee *v.* Allen, 21 Mo. 123; Allen *v.* Davis, 13 Ark. 28.

(*l*) Rice *v.* Austin, 17 Mass. 205, 206. So a contract by which the owner of a vessel lets her in consideration of a share of her earnings, or of the proceeds of the adventure, does not make the ship-owner and the charterer partners. Reynolds *v.* Toppan, 15 Mass. 370; Taggard *v.* Loring, 16 Mass. 336; Thompson *v.* Snow, 4 Greenl. 264; Winsor *v.* Cutts, 7 id. 261; Cutler *v.* Winsor, 6 Pick. 335. See Cox *v.* Delano, 3 Dev. 89. In French *v.* Price, 24 Pick. 13, the defendants were subscribers of a contract by which they agreed to become interested in a voyage and adventure, in certain definite proportions. They also, by the same instrument, appointed two of their number to manage the business abroad, who were to receive a commission and monthly wages as compensation for their services, and two others to manage the business in this country, purchase a suitable cargo, &c., and to be allowed to charge two and a half per cent on the amount of invoice and profits, and the same on all returns, but no commission for purchase or sale of vessel. They thereby also ratified the purchase of a vessel, which had been made by the home agents. Upon the question whether this agreement made the signers thereof partners, Morton, J., said: "Similar transactions and enterprises are very common in our country; and I believe, among merchants, never are considered or treated as partnerships. Many cases occur in which it may be extremely difficult to determine whether the joint-owners of property hold it as partners or as tenants in common. The case at bar may be one of them. But although the connection between the owners of the plant and cargo certainly contains many of the ingredients and properties of a partnership, yet, speaking for myself, I must say that in my opinion it does not come up to that relation. The case of Thorndike *v.* De Wolf & Tr., 6 Pick. 121, bears some resemblance to this; and that of Jackson *v.* Robinson, 3 Mason, 138, seems to me decisive."

*145 *the same principle has been applied where one advanced money to buy goods, and consigned them, to be repaid out of the goods, and to have a part of the net profits. (*m*) And, although it is usual for factors and brokers to charge a percentage commission for their services, they sometimes receive a share of the profits instead of a commission; but this fact alone would not make them partners. (*n*)

Trustees who continue to keep their funds in the partnership, and regularly withdraw their share of the profits, would generally be adjudged partners; and more certainly if they receive and hold the profits in part for their own use. (*o*)

*146 And it has been *held that both trustee and *cestui*

(*m*) In Rice *v.* Austin, 17 Mass. 197, Putnam, J., said: "So in the case of shipments to India upon half profits, so generally practised in this country; it would hardly be contended that the numerous freighters, often unknown to each other, have by such shipments become answerable for each other, or in any way interested as partners with the ship-owner, in respect to the dollars, which constitute the adventures, and which he undertook to carry to India for half the profits. . . . The resemblance between the cases now mentioned and the case at bar is very strong. The plaintiff advanced his funds to be invested by Lindsay in live oak in Florida, to be procured, cut, and transported, at the expense of Lindsay, but on the account and risk of the plaintiff, to the navy-yards of the United States; and for the services and disbursements of Lindsay, he was to have half the profits, as the owners of the freighting ships to India are compensated for their services and disbursements; and the plaintiff, for his risks and advances, was to have his principal sum repaid, and the residue of the profits. But it has never been thought that the return cargo was liable for the debts of the ship-owner."

(*n*) Dixon *v.* Cooper, 3 Wils. 40; Benjamin *v.* Porteous, 2 H. Bl. 590; Gibbons *v.* Wilcox, 2 Stark. 43; *ante*, p. *71, note (*l*). See also Miller *v.* Bartlett, 15 S. & R. 137; Blanchard *v.* Coolidge, 22 Pick. 151; Hoare *v.* Dawes, Doug. 371; Smith *v.* Watson, 2 B. & C. 401; Cheap *v.* Cramond, 4 B. & Ald. 663; Waugh *v.* Carver, 2 H. Bl. 235.

(*o*) See Barklie *v.* Scott, 1 Hud. & Bro. 83. The question of the liability of trustees as partners is perhaps most frequently raised in the case of executors of deceased partners. See *post*, ch. 13. A testator provided in his will that A. B. should have, hold, and carry on, in a husband-like manner, free of rent, a certain house, store, and other real estate until the time when the eldest son should be of age; and directed that he should be trustee of the testator's two sons, for the following purposes, to wit: That he should retain in his hands, for their use, all the goods, securities, money, and other stock in trade, belonging to said store, during said term — should trade upon the same in his own name, as said trustee, and at the end of the time deliver over to said sons all the original stock then remaining, and one full half of all the profits, and also interest upon a certain portion of such stock. A. B. accepted the trust, and carried on the business; and, on the arrival of the eldest son at the age of twenty-one, he executed to said A. B. a power of attorney, authorizing him to continue the business, the store, &c., as he had done under the will; and it was, therefore, continued until the youngest son

que trusts are chargeable as partners, where partnership property was held by trustees of an insolvent for the benefit of themselves and others, creditors of the assignor, and parties to the instrument. (*p*) This was a rigorous application of the rule, that participation in the profits carries liability as a partner. It was, however, confirmed by a later case in the Common Pleas; but that case has been overruled. (*q*)

It seems that executors, who keep the funds of a deceased partner in the firm, although they do it for the benefit of the next of kin, are liable as partners when the *cestui que trusts* are minors. (*r*) * But it has been *held*, that, if an * 147 executor is directed by the will to retain a certain amount

became twenty-one. *Held*, that this did not constitute a partnership. Gibson *v.* Stevens, 7 N. H. 352.

(*p*) Owen *v.* Body, 5 A. & E. 28.

(*q*) Hickman *v.* Cox, 18 C. B. 617; 3 C. B. N. S. 523; 13 E. L. & Eq. 400. But see this case reversed in 9 C. B. N. S. (99 Eng. Com. L. R.) 47; 8 H. of L. Cas. 268. See *ante*, p. * 71 and note. If a member of a firm, who is trustee of the property of a third person, having the sole control thereof, lend the trust-money to his firm, and take their note and mortgage therefor, running to the *cestui que trust*, the delivery of the note and mortgage by the firm to the trustee will be a sufficient delivery to give them effect in law. Tucker *v.* Bradley, 33 Vt. 324. But the distinction is to be noted, that, if the main object of a deed of assignment by a debtor is to have his trade carried on to make a profit for his creditors, the parties thereto become partners; but if the main object of the deed is the winding up of the debtor's affairs, and the carrying on of his business by the assignees is merely ancillary, and with a view to the realization of the debtor's assets, the parties executing the instrument are not thereby made partners. Janes *v.* Whitbread, 11 C. B. 406; 5 Eng. L. & Eq. 431; Coate *v.* Williams, 7 Exch. 205; 9 Eng. L. & Eq. 481. See *ante*, p. * 33, note; Price *v.* Groom, 2 Exch. 542. In Brundred *v.* Muzzy, 1 Dutch. 268, Brundred, Son, & Co., manufacturers, in consideration of their great indebtedness to the firm of Bell & Son, commission merchants, entered into an agreement by which, until the debt should be reduced to a certain sum, they transferred to Bell & Son the entire control of their business, with power to collect all moneys due to them, and to pay their own indebtedness at their pleasure. The machinery on hand, manufactured in whole or in part, it was stipulated should be delivered to Bell & Son, in payment of the prior indebtedness. Brundred, Son, & Co. were not to contract any indebtedness without the written consent of Bell & Son, and the acting partners of the former were limited to draw only specified sums for the support of their families. The firm of Bell & Son were authorized to employ an agent to superintend the business under their direction, part of whose salary was paid by them, and part out of the business of Brundred, Son, & Co. Brundred, Son, & Co., or Bell & Son, might discontinue the business after a period named, and dispose of the stock and fixtures at auction. It was *held*, that, by this agreement, the members of the two firms were not made liable as partners for debts afterwards contracted by Brundred, Son, & Co. See Town *v.* Hendee, 27 Vt. 258.

(*r*) In Wightman *v.* Townroe, 1 Maule & S. 412, the executors con-

in the old firm, the general assets of the testator beyond this amount are not liable, (*s*) nor is the executor thereby made a partner. (*ss*)

In Ireland, a father advanced a large sum to a partnership for his minor son, who became a partner, and the father was to have the right of knowledge, advice, &c., and the accounts of the partnership were rendered to him. But, the firm failing, he was adjudged not a partner; because the articles did not provide that he might withdraw any part of the profits, and he did not withdraw them in fact. (*t*)

It is quite certain that no mere interference with the affairs of the partnership, no advice in respect to them, not even a control of them, not even the right or the duty of interference, advice, or control, as part of an express contract, can *alone* make a party chargeable as a partner; (*u*) although they might be very influential, in connection with other circumstances, in determining the relation of a person to the partnership. Neither would the fact of joining in an order for the purchase
*148 or sale of goods, (*v*) or *for any mercantile transac-

tinued the money of a deceased partner in the firm, for the benefit of the infant daughter of the deceased. It was argued, that, as the executors did not hold themselves out to the world as partners, nor receive any part of the profits of the firm for their own use, but merely for the use of the infant daughter of the deceased, they could not be held liable as partners: but the court *held*, that they could not bind the infant by their acts; and that, by embarking the property in trade, they contracted a responsibility which their subsequent application of the profits to purposes not of personal benefit could not afterwards vary. See also *Ex parte* Garland, 10 Ves. 119; *Ex parte* Holdsworth, 1 Mont., D. & D. 475.

(*s*) *Ex parte* Garland, 10 Ves. 119.

[(*ss*) The performance of an article of partnership by an executor does not, *ipso facto*, render him personally responsible as a partner. There must be other facts and circumstances to show his personal liability. Owens *v.* Mackall, 33 Md. 382; Richter *v.* Poppenhusen, 39 How. (N. Y.) Pr. 82.]

(*t*) Barklie *v.* Scott, 1 Hudson & B. 83.

(*u*) In Barklie *v.* Scott, 1 Hudson & B. 83, the court said: "As to the stipulation that the house should be governed and directed by the defendant's advice, this does not constitute him a partner, nor give him any legal interest in the firm; it does not hold him out to the world as a partner, nor give him any share in the profits, nor empower him to dissolve, alter, or affect the partnership. Suppose that the defendant had not been the party advancing this money, but that the gift had been made by a third person, who had been desirous that the young man should have the advice of some skilful person engaged in trade, and had stipulated that the house should be directed by that advice, — could such a person be considered as a partner?" See Bryden *v.* Taylor, 2 H. & G. 400; Taylor *v.* Perkins, 26 Wend. 124; Smith *v.* Edwards, 2 H. & G. 411.

(*v*) Gibson *v.* Lupton, 9 Bing. 297.

tion, (*w*) suffice to create a partnership or its liabilities without other circumstances.

Whether one partner only or all the partners are liable for a debt, or, in other words, whether a debt be a several debt or a partnership debt, may sometimes depend not only on what the person sought to be charged *is*, but on what he *was*, and also not only upon what the debt was at its inception, but on what it has become. It is very common for an incoming or for a retiring partner to enter into an arrangement by which existing debts change their character. This will be considered when we treat of that class of partners. Here, however, it may be remarked, that the debt may be changed without any change in the partnership. If, for instance, a partner buys something on his own account, and is alone responsible, the partnership may afterwards join in the promise or guarantee it; so, if the debt be originally a partnership debt, it may afterwards be assumed by one partner alone, the others being discharged. An adoption by a partnership of a debt due from a single partner may be made impliedly, by acts as well as by express agreement; and it seems that, in some cases, slight circumstances will be sufficient to prove such adoption. (*x*)

The defendants, who were never general partners, ordered wheat of the plaintiffs, by an order containing the following words: "Payment for the same to be drawn upon each of us, in the usual manner." The plaintiffs, in a letter addressed to each of the defendants, answered: "We have made a purchase for your *joint* account." At the same time, they drew upon the defendants for one-third of the price, upon each by a separate bill for one moiety of the third. They afterwards despatched the wheat, and drew other similar bills, in the same manner, for the remainder of the price; having, however, previously written them: "We hold *you both* harmless for the advance up to the period of lading and invoice." The bill of lading, on its reaching the defendants, was indorsed by each of them; the freight and charges were paid by the money of each; and the wheat was equally divided between them when it was warehoused. Upon these facts, it was *held*, that the defendants were not jointly liable as partners for the whole price of the goods. See also Jackson *v.* Robinson, 3 Mason, 138; Harding *v.* Foxcroft, 6 Greenl. 76.

(*w*) Thus the fact that two persons sign a note jointly is no evidence of copartnership between them. Hopkins *v.* Smith, 11 Johns. 161. But it has been *held* otherwise where two persons draw a bill of exchange. Carvick *v.* Vickery, Doug. 653, note. See also Given *v.* Albert, 5 Watts & S. 339; M'Iver *v.* Humble, 16 East, 169; Gibbons *v.* Wilcox, 2 Stark. 43; Chandler *v.* Brainard, 14 Pick. 285; Clark *v.* Reid, 11 id. 446; Banchor *v.* Cilley, 38 Me. 553; Chase *v.* Stevens, 19 N. H. 465.

(*x*) See *Ex parte* Clowes, 2 Bro. C. C. 595; *Ex parte* Seddon, 2 Cox, 49; *Ex parte* Jackson, 1 Ves. 131; *Ex parte*

But there is no presumption of law which favors any such change. It must be shown to be done by all the parties, with a full knowledge of the circumstances, and by the consent or authority of all, and for good consideration, if any party comes under a new obligation, or if any other party surrenders
*149 any * right. (*y*) The obligation of the partnership, and the several obligations of a partner, may be cumulative; if A. signs a note beginning, "I promise," &c., "A. for A., B., & Co.," it is said that there is the note of A., and also the note of a partnership. (*z*) And, generally, if to the obligation of the

Lobb, 7 id. 592; *Ex parte* Hay, 15 id. 4; *Ex parte* Roxby, 1 Mont. Part. 198; *Ex parte* Fairlie, Mont. 17; *Ex parte* Hodgkinson, Coop. 101; Saville *v.* Robertson, 4 T. R. 720.

(*y*) In *Ex parte* Jackson, 1 Ves. 131, a widow in trade, and who was indebted by bond, took her son into partnership. A commission having issued against the firm, a petition was put in to prove the bond debt against the joint estate. The Lord Chancellor said: "If I can come at it in any manner, I will. For that reason I asked, if any interest had been paid upon that bond by both? for, if so, I should have considered it as adopting the debt, and making the partnership liable. Then I could do it consistently with the principle. If they have, in any way, considered the debt as a joint debt, I will understand it so, as it ought to be; for if one man, having debts, takes another into partnership with him, a very little matter respecting those debts will make both liable. Let it stand over, to see if you can fasten it in any way upon both, which I should be glad to do." See Daniel *v.* Cross, 3 Ves. 279. See also *Ex parte* Seddon, 2 Cox, 49; *Ex parte* Lobb, 7 Ves. 592; *Ex parte* Peele, 6 id. 602; *Ex parte* Hay, 15 id. 4; *Ex parte* Roxby, 1 Mont. Part. 198; *Ex parte* Fairlie, Mont. 17; *Ex parte* Hodgkinson, Cooper, 101; *Ex parte* Whitmore, 3 Mont. & A. 627. So *held* in *Ex parte* Williams, Buck, 13. But the Lord Chancellor said: "But I agree to the proposition, that a very little will do to make out an assent to the agreement. If any of the creditors named in the schedule think they can make out such a case, they may apply on that ground to prove their debts against the joint estate." See *Ex parte* Freeman, id. 471; *Ex parte* Fry, 1 Glyn & J. 96; *Ex parte* Whitmore, *supra*. See also Montagu on Bankruptcy, 2d part, p. 71; 3d part, p. 126. It will be seen, from the above cases, that where, for the separate debt of one partner, a creditor receives the joint security of all, if the contract to substitute the one for the other is clearly proved, there can be no question as to the consideration; the obtaining the responsibility of all the partners, in lieu of that of only one, being deemed sufficient.

(*z*) Galway *v.* Matthew, 1 Camp. 403; Hall *v.* Smith, 1 B. & C. 407; 2 Dowl. & R. 584. Upon such a note, however, perhaps only A. could be separately sued, since, upon the face of the note, A.'s is the only separate contract. See Clerk *v.* Blackstock, 1 Hodg. 474; Marsh *v.* Ward, Peake, 130; Wilks *v.* Back, 2 East, 142. Of the decision in Hall *v.* Smith, *supra* (where it was *held*, that upon a note commencing, "I promise," &c., and signed, "For A., B., & C. ——— A.," both the firm and A. separately were liable), it is remarked by Mr. Justice Story, that "this construction of the instrument certainly goes to the very verge of the law, and, perhaps, may be thought to deserve further consideration."

partner that of the firm purports to be superadded, or the obligation of a partner to that of the firm, it is no proof, and does not even give rise to a presumption that the prior obligation is discharged or lessened. (*a*)

SECTION VII.

HOW FAR PARTNERS ARE LIABLE IN SOLIDO FOR THE TORTS OF OTHER PARTNERS.

Partners are liable *in solido* for the tort of one, if that tort were committed by him as a partner, and in the course of the business of the partnership. This principle is frequently illustrated by cases in which a partnership is held liable for injury caused to third persons by their having acted upon the false and deceitful representations made to them by one partner. (*b*)

(*a*) *Ex parte* Seddon, 2 Cox, 49. There the petitioners had sold goods to one of the bankrupts, which were paid for by a joint note, and a receipt was given by the petitioners as for money paid, not expressing the payment to be made in the manner it really was. The question was, whether the petitioners had not accepted the security of the joint note, in full satisfaction of the debt, so as to preclude their coming on the separate estate. The Lord Chancellor: "To be sure, on the face of the note, it is a joint debt; but the question is, whether the creditor may not maintain his debt for goods sold and delivered; that is, Does the note extinguish the debt? If it had been a bond given, instead of the note, it would clearly have done so; but the note was no payment: and then as to the receipt, if it had remained unexplained, it would have been evidence of the debt being paid; but, when it appears how it was given, it is not conclusive. I think this may be proved as a separate debt. Hence, also, where several partners had given their separate bonds for money borrowed, which money, though lent on the individual securities of the respective parties, had come to the use of the partnership; and where, there being several other debts of the partners under the same circumstances, the partners came to an agreement to consolidate them, and to consider them the debts of the firm, the Lord Chancellor thought that, as the money was admitted by all the partners to have come to the use of the joint fund, it would entitle the creditors to consider themselves as joint or several creditors, and therefore to prove against the joint or separate estates; it being a joint debt in respect to its having come to the joint use, and separate from the nature of the security."

(*b*) As where the plaintiffs were induced to take the note of a third party in payment for goods sold upon the representation of one of the defendants, who were partners, that it was good, when, in fact, the defendants knew the makers were insolvent, and the note worthless; it was *held*, that the defendants were liable, either in an action of assumpsit to recover the value of the goods sold, or in an action on the case to recover damages for the deceit practised. Hawkins *v.* Appleby, 2 Sandf. 421. See Patten *v.* Garney,

*151 * It is not always easy to draw the line between such cases and those in which the partners are not liable.

17 Mass. 182; Doremus *v.* McCormick, 7 Gill, 49; Locke *v.* Stearnes, 1 Metc. 560; National Exchange Co. *v.* Drew, 2 Macq. (Sc. Ap. Cas.) 103, 32 Eng. L. & Eq. 1; Blair *v.* Bromley, 5 Hare, 542, 2 Phillips, 354. See Brydges *v.* Branfill, 12 Sim. 369; Coomer *v.* Bromley, 5 DeG. & S. 532, 12 Eng. L. & Eq. 307; Chester *v.* Dickerson, 51 Barb. 349. In one case (Willett *v.* Chambers, Cowp. 814), particular circumstances were *held* to make a partner liable for a fraud committed by his copartner before the beginning of their partnership. The facts were these: Prior to any partnership between the defendant and Dudley, an attorney and conveyancer, the latter, in the year 1771, received of a Mr. Bindley the sum of 350*l.*, to be laid out on real security. Dudley accordingly furnished him with a mortgage from a Mr. Hughes to that amount, which, as it afterward appeared, Dudley had *forged*. In 1776, Dudley and Chambers entered into partnership, shortly after which Bindley wanted to call in his money. The pretended mortgagor was represented at the same time to want a further sum of 150*l.*, which, added to the original mortgage-money, made together the sum of 500*l.* The plaintiff, Willett, was ready to advance this sum. And, in consideration of his doing so, an assignment was made to him of the false mortgage, before made to Bindley. As to 180*l.* *part* of this sum of 500*l.*, Willett paid it into Dudley's office to Chambers; who gave for it his separate receipt, Dudley not being at home. He subsequently called at the office, and paid the residue to Dudley, who gave therefor his separate receipt. It was admitted that Chambers was in no respect privy to the forgery. Upon these facts, the jury having found for the plaintiff, the Court of King's Bench *held*, that the verdict should stand; Lord Mansfield saying: "The defendant suffers by the rascality of a man who had a very good character. I am very sorry for the defendant; but, upon this evidence, I cannot say but that it is a partnership transaction." See, in illustration of the general principle of the text, Brydges *v.* Branfill, 6 Jur. 310, s. c. 12 Sim. 369; M'Farland *v.* Crary, 8 Cow. 258; Lowell *v.* Hicks, 2 Younge & C. 481; Blight *v.* Tobin, 7 Monroe, 617; Hadfield *v.* Jameson, 2 Munf. 53; Simms *v.* Brutton, 5 Exch. 802, 1 Eng. L. & Eq. 446; State *v.* Neal, 7 Fost. 131. In this last case it was *held*, that if one of two persons unlawfully sell spirituous liquors in pursuance of an agreement between them, and for their joint account and benefit, the other party may be liable in an indictment for the sale. State *v.* Bierman, 1 Strobh. 256. See Townsend *v.* Bogart, 11 Abb. Prac. R. 355; [doubted in Stewart *v.* Levy, 36 Cal. 159;] Gray *v.* Cropper, 1 Allen, 337; Taylor *v.* Jones, 42 N. H. 25; McKnight *v.* Ratcliffe, 44 Penn. 156. [So each member of a firm is civilly liable for a violation of the revenue laws by a copartner, whether with or without the knowledge of the others. United States *v.* Thomason, 4 Biss. 99. But, when one partner has obtained credit for goods sold the firm by false representations, the innocent partner cannot be arrested on civil process, under a statute authorizing arrest in case of fraud only, McNeely *v.* Haynes, 76 N. C. 122; nor adjudged guilty of actual fraud, Stewart *v.* Levy, 36 Cal. 159] "If one partner of a firm colludes with one of another firm, in a transaction connected with the partnership, the partners of the person so colluding are liable for damages to the injured firm, by reason of that partner's misconduct." Per Lord Tenterden in Longman *v.* Pole, 1 Dawson & Lloyd, 126, 1 Mood. & Malk. 223. In that case, the facts were as follows: The plaintiffs, Longman & Co., bankers with the defendants, Pole & Co., and Hunt, a partner in the house of Long-

The fact that money * procured by a fraud becomes part- *152
nership stock does not render them liable without their participation in or consent to the fraud. At the same time, if money be raised in the course of partnership business, by the fraud of one of the partners, the other partners will not be relieved from their liability for the fraud, merely by the want of evidence that the money so raised was applied to the use or benefit of the firm. (*c*)

man & Co., sent the cashier to the defendants with cash to take up bills accepted by him in the name of the firm and coming due the next day. He accordingly took up the bills, but by Hunt's order did not enter them in the plaintiff's books. About the same time, Downes, a partner in Pole & Co., told one of the defendants' clerks that a bill of Longman's would come in on such a day, which he was to pay and give to him (Downes), debiting Hunt with it in the note-book, so that it might not go into the ledger. Downes afterwards gave similar directions respecting another bill. Both these bills, which were acceptances by Hunt in the name of the firm, were paid and entered in the note-book to the debit of Hunt individually; and the cash payments made by Hunt to provide for these bills were also entered in the same book to his credit, so that no trace of these proceedings appeared in the pass-book of the defendants or the check-book of the plaintiffs. The cashier who gave the above statement also admitted that there were bills on Hunt's private account to a large amount, which appeared in the pass-book (which the plaintiffs were not in the habit of examining), but not in their check-book. It also appeared, that, at the time of these transactions, Hunt had a large private account with the defendant. Upon this state of facts, Lord Tenterden *held*, the action as brought clearly maintainable. But the jury found a verdict for the defendants, the collusion of Downes not being established with sufficient certainty

The rule respecting the liability of partners for each other's torts is, as we have seen, confined to such torts as a partner commits in that character, and in the course of the partnership business. Hence, where three partners were sued in an action of trespass, on account of the wrongful ejectment by one partner of the tenant of a canteen, it was ruled that one partner could not involve his copartners in such a wrong; though there might be exceptions to the rule, as where the trespass was in the nature of a taking which was available to the partnership, and they afterwards concurred in it and received the benefit of it; or where, before the trespass, they all joined in ordering it. Petrie *v.* Lamont, 1 Car. & M. 93. [Mere subsequent approval of a partner's tort, not done in the interests of the partnership, will not render the partnership liable. Wilson *v.* Turnman, 6 M. & G. 236; Grund *v.* Van Vlack, 69 Ill. 478.] In Pierce *v.* Jackson, 6 Mass. 245, Parsons, C. J., says: "A fraud committed by one of the partners shall not charge the partnership." And in Sherwood *v.* Marwick, 5 Greenl. 295, it seem to have been *held*, that one partner cannot be made liable for the fraud of another, without proof of actual participation. But in Locke *v.* Stearns, 1 Metc. 564, where all the partners were *held* liable for the deceit of one, Shaw, C. J., cites and explains both the above cases. He considers them to have been decided on their special facts, and to be not inconsistent with the general principle of law under discussion. See Atkinson *v.* Mackreth, Law Rep. 2 Eq. 570, and Linton *v.* Hurley, 14 Gray, 191.

(*c*) Compare Manuf. & Mech. Bank *v.* Gore & Grafton, 15 Mass. 75, with

If a partner steals money, and deposits it to partnership account, innocent partners would not be liable for the tort, although assumpsit for money had and received might lie. (*d*)

Boardman *v.* Gore, id. 331. [The firm is liable for frauds or torts practised by one of the partners in the partnership business, though the act was unknown to the other partners. Chester *v.* Dickerson, 52 Barb. (N. Y.) 349; Stewart *v.* Levy, 36 Cal. 159; Wolf *v.* Mills, 56 Ill. 360; Chambers *v.* Clearwater, 1 Abb. (N. Y.) App. Dec. 341; Jackson *v.* Todd, Sup. Ct. Ind., 5 Cent. L. J. 316. But, in an action to recover damages for the deceit, the injured party, not knowing the other parties, need not join them. Leslie *v.* Wiley, 47 N. Y. 649. See also Dart *v.* Walker, 3 Daly (N. Y. C. P.), 136. The firm is not liable for a tort by one partner, when the act is known, by the party injured, to be in violation of law. Leslie *v.* Wiley, 47 N. Y. 649. See also Dart *v.* Walker, 3 Daly (N. Y. C. P.), 136; nor for a deceit practised by one of the partners upon a third person, by the sale to him of such partner's interest in the firm, Schunbacker *v.* Riddle, Sup. Ct. Ill., 5 Cent. L. J. 271.]

(*d*) Rapp *v.* Latham, 2 B. & Ald. 795. Latham & Parry were in partnership as wine merchants. Parry, being the managing partner, in January, 1812, wrote to the plaintiff that he had an opportunity of purchasing sixty-one pipes of port, at 65*l.* per pipe, and he desired the plaintiff to remit the money to pay the price of such wine and the duties thereon. The plaintiff accordingly remitted the money, and Parry represented that he made the purchase, and afterward, in the name of the firm, transmitted an account to the plaintiff, stating that thirty of these sixty-one pipes had been resold at the price of 84*l.* per pipe, and paid the proceeds of such pretended sale to the plaintiff. Other similar transactions took place, running through a period of about one year. Each transaction formed the subject of a separate account, and all the purchases were described as being made at a certain specified rate per pipe. The plaintiff conceived that Parry was in fact laying out his money in *bonâ fide* purchases of wine, and that he actually resold part of such wine as he represented. But, the defendants failing, it appeared that the transactions were wholly fictitious, though the defendant, Latham, did not know that they were so. Upon the whole account, the plaintiff had received from the supposed resales more money than he had advanced; but he contended that he had a right to take each transaction separately, and to charge the defendants with the amount of the money advanced to them for the purchase of every pipe of wine not accounted for. It was *held*, that the plaintiff had such right; that Latham could not say that those transactions were fictitious which Parry had represented to be real; and that, beside retaining all the money that had been paid to him on account of those fictitious transactions, the plaintiff was also entitled to recover back the sums advanced for the other supposed purchases, as money advanced by him upon a consideration not performed, and as, therefore, had and received by the defendant to his use. In Kilby *v.* Wilson, Ryan & M. 178, it was *held*, that no property could be vested in a partnership by the fraud of one partner to which the rest were not privy. There the action was trover for divers bales of cotton, under the following circumstances: The plaintiffs, who were brokers, being employed by T. & Co. to purchase cotton, bought it of R., for the use of T. & Co. The plaintiffs paid R. for the goods, delivered East India Company warrants for them to T. & Co., and received, in return, their check for the cost of the cotton and the charges.

* But if it was the business of a firm to receive property * 153
on deposit and for safe-keeping, and one of the partners stole and sold something so deposited, and spent the money, the partnership would be liable. This rule, or rather the principle on which it rests, has been applied to trustees, one of whom forged the names of his cotrustees, to a power authorizing his copartners to sell. (*e*)

T. immediately pledged the warrants to the defendant, to cover his acceptances for two bills given to T. & Co. But the check taken by the plaintiffs for the cotton was dishonored; it afterwards appearing that the only object of T., in the transaction, was to raise money, and abscond, which he accordingly did on the same day that he received and pledged the warrants. Payne, T.'s partner, who drew the check, was altogether unconcerned in the frauds of the latter. The defendant's acceptances were subsequently recovered from T., and were delivered to the defendant by the assignees of T. & Co., which firm had been declared bankrupt. Abbott, Ld. C. J., left it to the jury to say whether or not T. obtained the goods from the plaintiffs with a preconceived design to raise money upon them and then abscond, without ever paying the plaintiffs; if he did, they should find for the plaintiffs; otherwise, if T. conceived the plan of defrauding the plaintiffs after he had obtained possession of the cotton. See Snaith *v.* Burridge, 4 Taunt. 684. See cases cited in last note. [Where one member of a firm uses trust funds in speculation in stocks, contrary to the copartnership article, and without the knowledge of the other, the latter is not liable. Guillou *v.* Peterson, 9 Phila. 225. If a partner, who has knowingly received stolen goods, after discovery pays for them out of the funds of the firm, to avoid prosecution, the money so paid cannot be recovered back in a suit in the name of the firm, even if the other partner is innocent, and the goods did not go to the use of the firm. Johnson *v.* Byerly, 3 Head (Tenn.), 194.]

(*e*) Stone *v.* Marsh, 6 B. & C. 551. The plaintiffs, Fauntleroy and others, held stock as trustees; and the defendants, of whom Fauntleroy was also one, were in partnership as bankers. Fauntleroy executed a letter of attorney, authorizing his copartners to sell the said stock, and forged thereto the names of his cotrustees. The stock was accordingly sold and transferred by the partners of Fauntleroy to the credit of the purchasers in the books of the Bank of England. The consideration-money thereof was paid into the bank of the defendants' agents, to the credit of the defendants, according to the usual practice on the sale of stock for the defendants. Fauntleroy was permitted by his partners to conduct the greater part of the business of the house without their interference, and drew upon the account at Martin, Stone, & Co.'s, in the partnership name (as he thought fit), without the knowledge and in fraud of his partners, more than the amount of the said sums so paid in. The defendants became bankrupt. Fauntleroy was tried for forging a similar instrument, convicted, and executed. The plaintiffs then presented a petition in bankruptcy, to be allowed to prove the amount of stock sold, against the joint estate of the bankrupts. Thereupon the Lord Chancellor directed an issue to try whether the defendants and Fauntleroy were, at the date, &c., indebted to the plaintiffs and Fauntleroy in any and what sum of money, it being also ordered that no objection should be taken on the ground that Fauntleroy was interested as a trustee jointly with the plaintiffs, and also as a partner with the defendants. *Ex*

* 154 * If one of a firm, being also a trustee, applies the trust funds to the use of the partnership, with the

parte Bolland, Mont. & M. 315; Stone *v.* Marsh, Ryan & M. 364. The Court of King's Bench *held*, that the money received by the banking-house of the defendants constituted a debt due from them to the trustees. Lord Tenterden: "Upon this state of facts, it cannot be doubted that it was the duty of the house to place the money to the credit of the trustees, and retain it for their use, and subject to their order; and that no ignorance on the part of any of them, even supposing all but one to have been ignorant of the facts (which, however, cannot have been), nor any neglect on the part of the house, arising from a misplaced confidence reposed by them in one of themselves, or otherwise, to which the plaintiffs were no parties, can deprive the plaintiffs of their right to their money." The plaintiffs were accordingly admitted to prove. For the defendants, it was argued at the trial at *nisi prius* (Ryan & M. 368): First, that no debt could be founded on and arise out of a felony; and that it was against the policy of the criminal law that the party whose name had been forged should be allowed to adopt the felony, or in any way to sanction it, or turn it to his advantage. Second, that, inasmuch as the transfer under a forged power worked no alteration of property, the plaintiffs had not lost their property, but still remained owners of the stock, and might call upon the Bank of England to account for both the principal and dividends. Third, that even if the defendants were fixed by the payment of the money to their agents, Martin & Co., still they were discharged by the repayment of it to Fauntleroy, one of the parties, whose property it was, and into whose hands and use it appeared by the evidence to have come. In answer to the first objection, it was *held*, in the Court of King's Bench (6 B. & C. 564), and by Lord Lyndhurst (Mont. & Mac. 397), that it was undoubtedly a principle of law that a man should not be allowed to make a felony the foundation of a civil action. But that this rule of law was one founded on public policy, which requires that offenders against the law shall be brought to justice, and ceases to operate when the reason for it fails; and that no such policy or rule was applicable to the present case, the offender having already suffered the extreme penalty of the law for a similar offence. Further, that the assertion that the plaintiffs were seeking to ratify a felonious act, and were making that act the ground of their demand, was incorrect. That the ground of their demand was the actual receipt of the money produced by the sale and transfer of their annuities. That the sale was not a felonious act, nor the transfer, nor the receipt of the money. That the felonious act was antecedent to all these, and complete without them. (See a similar opinion of the court in Boardman *v.* Gore, 15 Mass. 331, cited in note (*u*), *supra*.) In reply to the second objection, it was *held*, in the same courts, that whether or not the plaintiffs had a remedy against the Bank of England, it was unnecessary to decide, since their remedy against the defendants was clear, and, generally speaking, when an injured party has different remedies against different persons, he may elect which he will pursue. Upon the third objection, Lord Tenterden said, in Ryan & M. 369: "But they say, also, that Fauntleroy was one of the persons entitled, and that he has drawn the money out, and, therefore, they are not answerable. Now, if two persons give a power of attorney to bankers to sell out their joint stock, the bankers ought to place the proceeds to their joint account, and both ought to draw. If it is meant that the money should be paid to one, an authority to that effect ought to be given to the bankers; that, in my experi-

knowledge of the other partners,* the firm will be *155
chargeable with the amount, and held as debtors to the trust therefor. (*y*) It is said in some cases that the firm will not be liable in such case, unless the other partners have knowledge of the trust and of this application of the trust funds. (*z*) But it has also been held, that if a member of a firm

ence, has been the ordinary practice. If you are of opinion that this is the usual mode of dealing, then, as against the other two, it is no defence that the payment has been made to one only of several who are jointly entitled to receive it." See, to the same point, *Ex parte* Bolland, 1 Mont. & A. 570; Keating *v.* Marsh, id. 582; Marsh *v.* Keating, id. 592, s. c. 2 Cl. & Fin. 250. In Hume *v.* Bolland, 1 C. & M. 130, s. c. 2 Tyr. 575, a case arising out of the same bankruptcy, Marsh & Co., the banking firm of which Fauntleroy was a member, had been employed by the trustees of stock, standing in their names on the books of the Bank of England, to receive the dividends thereon. In the books of Marsh & Co., accordingly, the amount of the dividends was regularly carried to the credit of their employers, and was by them drawn for and received. But it afterwards appeared that none of the above dividends had in point of fact been received by Marsh & Co.; Fauntleroy having transferred and sold the stock by means of forged powers of attorney, and having caused the above entries to be made in the books of the firm in fraud of his copartners, the money never having been received by them. Upon the issuing of commissions against Marsh & Co., a case being sent to the Exchequer to try the question whether the bankrupts were indebted to the trustees, and if so in how much, it was *held*, that, at the date of the commissions, the bankrupts were not indebted to the trustees for the balance of the dividends appearing by the books to have been received. But see Hume *v.* Bolland, Ryan & M. 371; also, Keating *v.* Marsh, *supra*, subsequently decided in the House of Lords, in Sadler *v.* Lee, 6 Beav. 324.

(*y*) *Ex parte* Watson, 2 Ves. & B. 414; Smith *v.* Jameson, 6 T. R. 601; Boardman *v.* Mosman, 1 Bro. C. C. 68; Jaques *v.* Marquand, 6 Cow. 497; Hutchinson *v.* Smith, 7 Paige, 26; Richardson *v.* French, 4 Metc. 577.

(*z*) *Ex parte* Heaton, Buck, 386; *Ex parte* Apsey, 3 Bro. C. C. 265; [Guillou *v.* Peterson, 9 Phila. 225; Dounce *v.* Parsons, 45 N. Y. 180.] But see Richardson *v.* French, 4 Metc. 577; Whitaker *v.* Brown, 16 Wend. 509; Freeman *v.* Fairlie, 3 Meri. 44. In this last case, it seems to be *held*, that, if the other partners merely permit one partner to mix his accounts as executor with those of the firm, the partners may, without proof of further knowledge on their part, be compelled to produce those accounts to the *cestui que trust*. And, in the following case, the fact, that, during the continuation in a firm of trust funds by a breach of trust on the part of some of the partners, other partners entered and retired from the firm, seems to have exempted the latter from liability for the breach of trust of their copartners to which they were privy. A., a partner in a house of agency in India, died, having by his will directed his estate to be called in, and invested on certain trusts, and appointed two of his copartners his executors. They, however, suffered his share in the partnership to remain in the house. After A.'s death, B. and C. were admitted as partners, and they knew that A.'s share was remaining in the house, and that it was subject to the trusts of his will. They afterwards retired, and other partners were admitted. The house ultimately failed. *Held*, that B. and C. were not responsible for the breach of trust committed by their copartners, the executors. Twyford *v.* Trail, 7 Sim.

holding funds as an agent of a third party, puts that money into the business of the firm, the firm is liable whether the other partners knew that the money was so held or not. (*zz*) How far the knowledge and consent of the other partners is necessary to make them liable is not distinctly settled on the authorities.

* 156 A partnership to whom goods were consigned for sale was held * liable for the pledge thereof by a fraudulent partner; (*a*) so was a firm of common carriers, one of whom lost property intrusted to them; (*b*) and partners in a publishing house, one of whom published a libel; (*c*) and partners in the stage-coach business, one of whom caused an injury by negligent driving. (*d*)

So all the partners are liable for the tort of an agent, although that agent were appointed by one partner only, provided he had authority to make the appointment. (*e*) So it would be in case of a breach of the revenue laws. (*f*) And a demand upon and

92. Where trust money is put into trade without authority, the *cestui que trust* may generally elect to take from the trustees either a share of the profits, for the period of the breach, or interest for that time. There may, however, be circumstances in which the *cestui que trust* will have a right to divide the period, and to claim interest for one part and a share of the profits for another. Heathcote *v.* Hulme, 1 Jac. & W. 722; Docker *v.* Somes, 2 Mylne & K. 656. See Clayton's Case, 1 Meri. 572; Hankey *v.* Garrett, 1 Ves. 236.

(*zz*) Floyd *v.* Wallace, 31 Ga. 688. And see Harper *v.* Lamping, 33 Cal. 641.

(*a*) Nicoll *v.* Glennie, 1 M. & S. 588.

(*b*) Mitchell *v.* Tarbutt, 5 T. R. 649.

(*c*) Rex *v.* Almon, 5 Burr. 2686; Rex *v.* Pearce, Peake, 75; Rex *v.* Topham, 4 T. R. 126; Rex *v.* Marsh, 2 B. & C. 723, per Littledale, J.

(*d*) Moreton *v.* Hardern, 4 B. & C. 223.

(*e*) As where several persons are proprietors of, and partners in, a line of stage coaches, but each stocks, and employs drivers for his own particular portion of the road; all the partners are liable for injuries caused by the misconduct and negligence of a person employed on any portion of the line, though such wrong-doer is hired and paid by only one partner. Weylan *v.* Elkins, Holt, N. P. 227; 1 Stark. 272; Bostwick *v.* Champion, 11 Wend. 571, 18 id. 175; Bayley, J., in Laugher *v.* Pointer, 5 B. & C. 570. See also Dwight *v.* Brewster, 1 Pick. 50; Cobb *v.* Abbott, 14 id. 289; Stockton *v.* Frey, 4 Gill, 406; Hadfield *v.* Jameson, 2 Munf. 53; Locke *v.* Stearns, 1 Metc. 560; Roberts *v.* Totten, 8 Ark. 609; National Exch. Co. *v.* Drew, 2 Macq. (Sc. Ap. Cas.) 103, 32 Eng. L. & Eq. 1; Cotton *v.* Bettner, 1 Bosw. 430. [And the action may be brought against one or more or all the partners. Roberts *v.* Johnson, 58 N. Y. 613.]

(*f*) Attorney-General *v.* Strongforth, Bunb. 97; Attorney-General *v.* Burges, id. 223; Attorney-General *v.* Siddon, 1 Cromp. & J. 220; [United States *v.* Thomason, 4 Biss. C. Ct. U. S. 99; *ante*, p. * 151, note.]

a refusal by one partner is a conversion by the firm, which will sustain trover. (*g*)

But even if the tort were committed by a partner in the performance of the partnership business, it might, from its nature or attendant circumstances, be shown to be only a several act. As if two physicians were in partnership, and one intentionally maltreated a patient. So if two were partners as bankers and bill-brokers, and one of them discounted a note usuriously, this would be his own act only, or the act of the partnership, according to his authority, or the usage of the firm, or other circumstances. (*h*)

* It is to be observed that, although all the partners * 157 may be liable for a tort, and all may be sued jointly, they may also be sued severally; for, in law, all torts, however joint, and whether constructive or actual, are several. It is, therefore, no answer for a defendant sued in tort to say that others were guilty with him. (*i*)

(*g*) Nisbet *v.* Patton, 4 Rawle, 120; Holbrook *v.* Wight, 24 Wend. 169; Mitchell *v.* Williams, 4 Hill, 13. The managing partner, who conducted the business of a mine, refused to deliver up ore belonging to the former tenants of the mine, on the ground that it was partnership property, and there was subsequently a notice, by the attorney for the defendants, offering to deliver up tools that were in the same building with the ore; but the notice was silent as to the ore. *Held*, evidence of conversion by all the partners. Lloyd *v.* Bellis, 37 Eng. L. & Eq. 545. See Com. Dig. tit. Trespass, ch. 1; Nicoll *v.* Glennie, 1 M. & S. 588; Dore *v.* Wilkinson, 2 Stark. 287.

(*h*) When one partner, without the knowledge of the other, borrows money at usurious interest, and executes a note in the name of the firm; and afterwards pays the usurious interest, and the other partner, ignorant of the payment of the usury, executes his own note in lieu of the other, — he cannot, when sued upon it, set up as a defence the payment of usury by his partner. Jones *v.* Jackson, 14 Ala. 186. See Hutchins *v.* Turner, 8 Humph. 415.

(*i*) If an attorney is in partnership with another, and they carry on their business together, and their joint names are put on their papers in causes in their office, either of them is liable to the penalties of the act 37 Geo. 3 for practising as an attorney without entering his certificate, though it does not appear that one of them had any profit or advantage from the suit for suing in which the action in *qui tam* is brought. 1 Wms. Saund. 291, d; Rich *v.* Pilkinton, Carth. 171; Sutton *v.* Clark, 6 Taunt. 29; Edmondson *v.* Davis, 4 Esp. 14; Attorney-General *v.* Burges, Bunb. 223; Mitchell *v.* Tarbutt, 5 T. R. 649; Stockton *v.* Frey, 4 Gill, 406. As all the partners may be affected by the tort of one, so a release to one of all liability in respect of the tort will operate as a release and discharge of all. Co. Litt. 232, a; Bac. Abridg. Release (G); Com. Dig. Release, B. 4; id. Pleader, 3 M. 12; Kiffin *v.* Willis, 4 Mod. 379; Williamson *v.* McGinnis, 11 B. Mon. 74. Case is the proper action against partners for injuries caused by the negligence of their servant; and, if the damage be effected by laches simply, it will lie

Partners are not only liable in actions *ex contractu* and *ex delicto*, but also in actions *quasi ex contractu*, which, though in form founded in tort, are in fact actions of contract. (*j*)

* 158 To * the general rule, however, that actions *quasi ex contractu* are to be regarded as actions of contract, and that the form of the action will not vary the right of defence, an exception has been made in the case of common carriers. Actions against them seem now, though not formerly, to be regarded as resting in tort, unless a special contract is explicitly stated in the declaration. (*k*)

against them, even though one partner were present, personally, and acted in that which occasioned the damage. So, where one partner is a wilful wrong-doer, if under the circumstances any action is sustainable against his copartners, case is still the proper remedy. But, as against the malicious partners solely, trespass is the proper form of action. Mitchell *v.* Tarbutt, 5 T. R. 649; Morley *v.* Gaisford, 2 H. Bl. 442; Huggett *v.* Montgomery, 5 B. & P. 446; Leame *v.* Bray, 3 East, 593; Ogle *v.* Barnes, 8 T. R. 188; Rogers *v.* Imbleton, 5 B. & P. 117; Moreton *v.* Hardern, 4 B. & C. 223; Whiteman *v.* Smith, 12 Rich. Law (S. C.), 595.

(*j*) In Govett *v.* Radinge, 3 East, 62, where the action was brought against three for negligently loading a hogshead, to two of whom a certain reward was to be paid, and to the third a certain other reward, the action was *held* to be founded in tort, and not in contract, and to be attended with the consequences of tort; so that one of the codefendants could be found guilty, and the rest acquitted. But this case appears to be no longer law. See Powell *v.* Layton, 5 B. & P. 364; Max *v.* Roberts, id. 454; Weal *v.* King, 12 East, 452; Walcott *v.* Canfield, 3 Conn. 198. The general conclusion to be deduced from the authorities is thus expressed by Mr. Collyer: "It might perhaps be a question, whether, if an action on the case were brought against several defendants, in a matter where there is no action by the custom of the realm, and no express or particular contract were stated on the declaration; such action would be considered as laid in tort or in contract; but, upon the whole, it is conceived that the court would look to the real nature of the case, without reference to the form of the declaration; and would hold the action to be attended with the consequences of tort or contract, according as tort or contract was the essence of the actual transaction between the parties." Collyer on Part. (Am. ed.) § 738. See Jennings *v.* Randall, 8 T. R. 335; Green *v.* Greenbank, 2 Marsh. 485; Marzetti *v.* Williams, 1 B. & Ad. 415; Barnett *v.* Lynch, 5 B. & C. 589; Newberry *v.* Colvin, 7 Bing. 190.

(*k*) Boson *v.* Sandford, 1 Show. 101, 2 Show. 478; Powell *v.* Layton, 5 B. & P. 370; Max *v.* Roberts, id. 454, s. c. 12 East, 89; Tuttle *v.* Cooper, 10 Pick. 283–287, 6 M. & S. 385; Bretherton *v.* Wood, 6 Moore, 141, 3 Brod. & B. 52; Pozzi *v.* Shipton, 8 A. & E. 963. The reason for this exception with reference to a common carrier seems to be, that he is regarded as a public servant, against whom an ancient action lies, founded on the custom of the realm, for the breach of his public duty. See Gould Pl. 205.

CHAPTER VII.

OF THE RIGHTS AND DUTIES OF PARTNERS BETWEEN THEMSELVES.

SECTION I.

OF THE RIGHT OF CHOICE AS TO A PARTNER.

No one among the rights of partners is more certain, or leads to more important consequences, than that to which we have already referred as implied by the phrase *dilectus personarum*. Every partnership must be, in its beginning, voluntary, and the result of the choice and wish of those who become partners. Precisely so as to admission of new partners, it must continue to be. (*a*) Hence, whatever rights a partner may have of assigning or otherwise disposing of his share of the stock or profits (a subject to be presently considered), his character or relation of partner cannot be assigned. (*b*) And if he

(*a*) The civilians pushed the principle of *dilectus personarum* to a great, and, as Pothier thinks, to an unreasonable extent; for with them, even a stipulation between partners, that heirs or executors should succeed to the relation of partner, was deemed to be void. Domat, lib. i. tit. 8, § 2; Pothier, *Traité du contrat de société*, ch. 8, § 3; Crawshay *v.* Maule, 1 Swanst. 509, note. The doctrine of the English and American Law is otherwise, and stipulations for the admission of such persons into a firm upon the decease of a partner are frequent, and are always, as far as possible, enforced by the courts. See Wrexham *v.* Hudleston, 1 Swanst. 514, &c.; Balmain *v.* Shore, 9 Ves. 500; Warner *v.* Cunningham, 3 Dow, 76; Gratz *v.* Bayard, 11 S. & R. 41; Scholefield *v.* Eichelberger, 7 Pet. 586; Downs *v.* Collins, 6 Hare, 418; Page *v.* Cox, 10 Hare, 163, 17 Eng. L. & Eq. 572. See Reynolds *v.* Hicks, 19 Ind. 113; Buckingham *v.* Hanna, 20 Ind. 110.

(*b*) Raymond's Case, 2 Rose, 255; Kingman *v.* Spurr, 7 Pick. 235; Gilmore *v.* Black, 2 Fairf. 488; Moddewell *v.* Keever, 8 W. & S. 63; Cowles *v.* Garrett, 30 Ala. 341; Ketcham *v.* Clark, 6 Johns. 144; Murray *v.* Bogert, 14 id. 318. In Marquand *v.* New York Manuf. Co., 17 Johns. 525, Fitch assigned his interest in a partnership, by the articles of which it was provided that it should continue until two of the partners should demand a dissolution. The other partners desired the partnership to go on notwithstanding the assignment. But, per Woodworth, J.: "It is well settled in England, that an act of bankruptcy is a dissolution of partnership; this is by reason of the

*160 does assign it, and the *other partners receive the assignee among them and into the partnership, the new partner becomes one, altogether by their reception and his agreement with them, and in no degree by the assignment or transfer by him who has ceased to be a partner. (*c*) In an English case, a person entering into business was guaranteed to the firm up to a certain amount by his father, and in consideration thereof contracted to pay to his father a certain

assignment, which severs the interest of the bankrupt, by operation of law. An assignment made by the party himself, under circumstances like the present, produces the same result: in both cases, they give rise to a state of things altogether incompatible with the prosecution of a partnership concern, commenced and previously conducted by the bankrupt and his former copartners. It is perfectly clear that a new partner cannot be admitted without consent. This, *ex vi termini*, implies that even consent would be nugatory, unless the assignee elected to become a partner; when he does not so elect, but (as in the present case) insists on a division of the property, the demand, according to acknowledged general principles, cannot be denied." Mathewson *v.* Clark, 6 How. S. C. 122; Putnam *v.* Wise, 1 Hill, 238; Channel *v.* Fassitt, 16 Ohio, 166; Mason *v.* Connell, 1 Whart. 381; Horton's Appeal, 13 Penn. St. 67; Bray *v.* Fromont, 6 Madd. 5. In Goddard *v.* Hodges, 1 C. & M. 33, the plaintiff was the solicitor of a bridge company, and on that account not desiring to appear as the owner of shares in a company, had procured one Fall to be the nominal stockholder of a certain number of shares, the plaintiff, however, being the real owner, making the deposits, and paying all other expense on the shares. In an action to recover compensation for professional services, the plaintiff cited Bray *v.* Fromont, *supra;* and contended that, as between himself and the bridge company, he was not a partner, since there was no consent nor agreement of the company to receive him as such. But the court *held* otherwise, and a nonsuit was entered. See Bradley *v.* Harkness, 26 Cal. 76.

(*c*) The effect of an assignment by a partner of his interest in a copartnership is to give the assignee a right to insist upon an account of the joint concern, and to claim whatever his assignor would be entitled to upon a settlement of accounts, upon satisfaction of the claims of the other partners. Nicoll *v.* Mumford, 4 Johns. Ch. 522; Rodriguez *v.* Heffernan, 5 id. 417; Marquand *v.* New York Manuf. Co., 17 Johns. 525; Kingman *v.* Spurr, 7 Pick. 235; Bray *v.* Fromont, 6 Madd. 5; Mathewson *v.* Clark, 6 How. S. C. 122; Moddewell *v.* Keever, 8 Watts & S. 63. In this last case it was *held*, that an acquittance of a partnership debt, given by the assignee of one partner's share, could not have the effect of relieving the debtor from liability to the firm for the same debt. *Ex parte* Barrow, 2 Rose, 252; Brown *v.* De Tastet, Jac. 284; 2 Bell Comm. 636. See Newland *v.* Tale, 3 Ired. Eq. 226; Cowles *v.* Garrett, 30 Ala. 341. The transferee of a portion of a copartner's interest has a debt which he may prove against the transferrer's estate. *Ex parte* Dodgson, Mont. & M'A. 445. But the assignee of a partner's interest cannot withdraw his share of the joint effects. They must remain in the possession of the continuing partner, for the purpose of winding up the affairs of the partnership, which has been dissolved by the assignment. Horton's Appeal, 13 Penn. St. 67; Meaher *v.* Cox, 1 Sel. Cases Ala. 156.

sum out of the profits. Afterwards marrying, he made a marriage settlement, by which he transferred all the profits and earnings of the business to his father and another, in trust, first to secure the father's annuity, and then on other trusts. It was held by the Court of Common Pleas that the father became a partner in the business and liable for the debts. (*cc*) But the judgment was reversed in the Exchequer Chamber. (*ccc*)

So if a partner bequeaths his interest in a firm to some one, this will not make the legatee a partner; (*d*) nor will the bequest * have this effect although the legacy is ex- * 161 pressly for the purpose of making him a partner, and is said to be a legacy of all the rights, &c., of a partner; for this character of partner is not transferable. But one who represents the interest of a former partner, if received by the other partners and treated as a partner, becomes a partner under the original articles. (*dd*) Nor is the *dilectus personarum* a right of the old partners only. It belongs just as much to the new partner. No act of any others can, of itself, make him a partner. He must himself give his consent, and enter into the firm by his own act. If a transfer of a partner's interests and rights were made with an intent on the part of the transferrer that the transferee should thereby be made a partner, he would not become one as to the others, without their and his acquiescence. (*e*) There may be reasons for saying that he would become one as to third parties by his own consent and acquiescence alone; but we do not think that he could be made liable as a partner, on his own consent and acquiescence alone, unless these were manifested in some way which amounted to his holding himself out as a partner. That is, we think his consent and acquiescence alone would not make him liable as a partner, on the ground that he

(*cc*) Bullen *v.* Sharp, 18 C. B. N. S. 614.

(*ccc*) Same *v.* Same, Law Rep. 1 C. P. 86. From this reversal, Shee, J., & Pigott, B., dissented.

(*d*) Nor are the executors of a deceased partner, nor the assignees of a bankrupt one, partners with the other member of the original firm. They are simply entitled to an account. Pearce *v.* Chamberlin, 2 Ves. 33; Wilson *v* Greenwood, 1 Swanst. 482; Fox *v.* Hanbury, Cowp. 445; Hague *v.* Rolleston, 4 Burr. 2177; *Ex parte* Williams, 11 Ves. 5; Griswold *v.* Waddington, 15 Johns. 82; Marquand *v.* New York Manuf. Co., 17 id. 535; Kingman *v.* Spurr, 7 Pick. 238.

(*dd*) Meaher *v.* Cox, 37 Ala. 201.

(*e*) See Marquand *v.* New York Manuf. Co., 17 Johns. 529, 535, and other cases cited in preceding notes.

actually became one; because he is no partner until the other partners receive him.

It is, perhaps, possible that the consent of the former partners may be given beforehand, and the consent of the transferee implied by the reception of the things transferred. If, for example, a joint-stock company, which is a kind of partnership, provided by its rules that the shares should be regarded and treated as transferable, and as a kind of scrip; that each share was such an aliquot part of the whole, or represented a certain amount of money, and one man might hold a number of them; and if it was farther provided that a sale of a share, acknowledged before the clerk, and recorded, with a delivery of the former certificate and the issue of a new one, would make the holder of the new certificate one of the company; in such case we should say that the transferee became at once a stockholder, which, in this case, would mean a partner, by the completion of the transfer according to the rules of the com-
*162 pany. (*f*) And it is possible, also, * that the articles

(*f*) This would seem to be a legitimate conclusion from the opinion of the court in Fox *v.* Clifton, 9 Bing. 115, 6 id. 776. There several persons were sued as partners in a distillery company. It was in evidence that, such a company being in process of formation, upon payment of a deposit, scrip receipts were issued to the subscribers, which were to be surrendered for certificates of shares, when the partnership deed was prepared and signed; that the scrip of the company was openly sold in the market; the persons producing that scrip, and paying the instalments due, were, without further inquiry, permitted to sign the company's deed as partners; and that Levi, one of the defendants, had, before the contract was made upon which the present suit was brought, sold his scrip. C. J. Tindal: "The present case appears not to be governed by reference to the rules which restrain partners from parting with their shares in ordinary cases, without each other's consent; for, in this case, the power of transferring the scrip to any one cannot but have formed a part of the known original design." After adding that at the time the contract was entered into with the plaintiff, Levi was not and could not be a partner: "On the other hand, the man who had purchased his scrip, if he was willing to pay up the second instalment, would have been entitled and allowed to receive a certificate of his share, and to execute the deed without difficulty." But where, as supposed in the text, the articles of an association prescribe a particular method of transferring shares, that mode must be strictly followed; for the formalities of transfer are the terms or conditions upon which the members of the company give their consent to the admission of a new partner. Ness *v.* Angas, 3 Ex. Ch. 805, 814; Dodgson *v.* Bell, 5 id. 967, 3 Eng. L. & Eq. 542; Kingman *v.* Spurr, 7 Pick. 235; Cochran *v.* Perry, 8 Watts & S. 262. In *Ex parte* Wood, Keene's Executors' Case, De Gex, Mac. & G. 272, 17 Eng. L. & Eq. 236, a joint-stock company may, by long acquiescence in the neglect of its directors to

of a private partnership might contain similar provisions, with a system of transfer to carry them into effect. But it remains true, that the consent and acquiescence of all the members of a partnership are necessary to its becoming a partnership, however or whenever this consent and acquiescence take place, or may be proved, implied, or inferred.

SECTION II.

OF THE RIGHT OF ASSIGNING OR TRANSFERRING PROPERTY.

The right of every partner to sell, assign, or transfer, any part or the whole of the partnership property, in the way of the * regular business of the partnership, is abso- * 163 lute and unquestioned. (*ff*) There is an exception to this rule in reference to the real estate of a partnership, (*fg*) but none as to the personal property. Suppose a partnership dealt in buying and selling cotton, and all their stock consisted in five hundred bales stored in New York; there is no more doubt that either one of the partners might sell, and give good title to the whole, than that he could do so with a single bale. (*g*) This, however, must be done in the regular course

carry out one or more of its regulations respecting the transfer of shares, and the admission of new shareholders, be precluded from taking advantage of such informality in the transfer of shares; and, further, that a shareholder, thus irregularly introduced into a company, if he has become *de facto* a shareholder, is debarred from raising an objection of form against the company, so as to relieve himself from the obligations of a shareholder. Bargate *v.* Shortridge, 5 House of Lords' Cases, 297, 31 Eng. L. & Eq. 44. And though, by articles of copartnership, it is provided that any partner may assign his share of the stock by a certificate in writing, which, when lodged with the clerk of the company, shall entitle the assignee to all the privileges, and subject him to all the liabilities, of an original partner, an assignment without such certificate will, nevertheless, transfer the property. Alvord *v.* Smith, 5 Pick. 232.

(*ff*) For an interesting case on the question, If one acting as a partner sells, without the consent of his copartner, what amounts to a ratification of the sale? see Cheeseman *v.* Sturges, 9 Bosw. 246.

(*fg*) See *post*, p. * 376.

(*g*) The absolute *jus disponendi* of each partner over the effects of the partnership is very early asserted in Lambert's Case, 1 Godb. 244. See Barton *v.* Williams, 5 B. & Ald. 405, per Best, J.; Lyles *v.* Styles, 2 Wash. C. C. 224; Pearpoint *v.* Graham, 4 id. 234; Law *v.* Ford, 2 Paige, 310; Winship *v.* Bank of the United States, 5 Pet. 561; Lamb *v.* Durant, 12 Mass. 54; Pierson *v.* Hooker, 3 Johns. 70, per Kent, C. J.; M'Cullough *v.* Sommerville, 8 Leigh,

of the business of the firm; for, outside of this he has no such power. (*h*) If he does this in fraud of the other
* 164 partners, — * that is, if he sells the whole, or any part, intending to run off with the proceeds, and does run off with them, — this has no effect on the title of the purchaser, unless he has some knowledge of the fraud, or would have had some knowledge of it but for a negligence so gross as would tend to imply fraud. (*i*)

430; Tapley *v.* Butterfield, 1 Metc. 518; Whitton *v.* Hulbert, Freeman, Ch. 231; Forkner *v.* Stuart, 6 Gratt. 197; Fromme *v.* Jones, 13 Iowa, 474. In Anderson *v.* Tompkins, 1 Brock. 456, Chief Justice Marshall affirms this power in the most positive terms. Boswell *v.* Green, 1 Dutch. 390. [See also McGregor *v.* Ellis, 2 Dis. (Supr. Ct. Cin.) 286.] As examples of assignments by one partner, see Young *v.* Keighly, 15 Ves. 557; Harrison *v.* Sterry, 5 Cranch, 289; Anderson *v.* Tompkins, 1 Brock. 456; Dana *v.* Lull, 17 Vt. 390; *post*, p. * 169, and notes, where the cases are collected. A partner's *jus disponendi* extends to choses in action as well as those in possession. See Swan *v.* Steele, 7 East, 210; Harrison *v.* Sterry, 5 Cranch S. C. 289, 300; Quiner *v.* Marblehead Social Ins. Co., 10 Mass. 482; Mills *v.* Barber, 4 Day, 428; Halstead *v.* Shepard, 23 Ala. 558, 573. One partner may bind his firm by assenting to the transfer of a debt on account, due from the firm, from one banker to another. Beale *v.* Caddick, 2 H. & N. 326. This right is in no way affected by a secret act of bankruptcy previously committed by another partner. Fox *v.* Hanbury, Cowp. 445. Nor by the fact that the proceeds arising from a transfer of partnership effects have not come to the use nor to the advantage of the firm. Arnold *v.* Brown, 24 Pick. 89. Nor, in point of principle, is there any difference between so-called general partnerships and those for a special adventure, as to the power possessed by each partner of disposing of the joint property. Livingston *v.* Roosevelt, 4 Johns. 251, 265, 277. See the language of Best, J., in Barton *v.* Williams, 5 B. & Ald. 405. But this power of one partner to dispose of the partnership effects does not extend to the real estate of the firm. Anderson *v.* Tompkins, 1 Brock. 456; Tapley *v.* Butterfield, 1 Metc. 518, 519; Coles *v.* Coles, 15 Johns. 159; Piatt *v.* Williams, 3 McLean, 27. And there must be a special authority, delegated to one partner, to give validity even to an executory contract for the sale of land employed in the partnership business. Lawrence *v.* Taylor, 5 Hill, 107.

As with sales so with purchases: a purchase by one partner, in the course and within the scope of the regular business of the firm, binds the partnership. The principle is laid down in a case as early as 1696, Hyat *v.* Hare, Comb. 383. See Bond *v.* Gibson, 1 Camp. 185; Dyke *v.* Brewer, 2 C. & K. 828; per Brainerd, J., in Mills *v.* Barber, 4 Day, 430; Dougal *v.* Cowles, 5 id. 515; per Spencer, J., in Walden *v.* Sherburne, 15 Johns. 422; Braches *v.* Anderson, 14 Mo. 441; Dubois's Appeal, 38 Penn. 231.

(*h*) 2 Chan. Cases, temp. Car. 2, 32, 38. Anon., 16 Vin. Abr. 242. See Livingston *v.* Roosevelt, 4 Johns. 266, 267, 278; Walden *v.* Sherburne, 15 id. 422. See the remarks of Marshall, C. J., in Anderson *v.* Tompkins, 1 Brock. 460; Rogers *v.* Batchelor, 12 Pet. 221. See farther, as to this point, section 3d, subsection 2d, of this chapter, on the general extent of the power of a partner; and see Wells *v.* March, 30 N. Y. 344, and Coope *v.* Bowles, 42 Barb. 87, and Palmer *v.* Myers, 43 Barb. 509.

(*i*) So it was said by Marshall, C. J., in Anderson *v.* Tompkins, 1 Brock. 460. An assignment by one partner

If, however, a partner undertakes not to sell the goods or property of the partnership, but to assign them, by way of pledge or mortgage to secure the debts of the firm, or in any unusual way, he has not *necessarily* any power to do this. Neither do we consider it certain that he has no power to do it. On the one hand, such a transaction seldom or never belongs to the regular business of a firm. (*j*) If it does, of

of partnership assets to another, to be applied to the individual purposes of the latter, is a breach of trust in both assignor and assignee, and void as to the firm. Wood *v.* Shepherd, 2 Patt. & Heath, 442; Rodriguez *v.* Heffernan, 5 Johns. Ch. 417; Halstead *v.* Shepard, 23 Ala. 558; Clayton *v.* Hardy, 27 Mo. 536; Croughton *v.* Forrest, 17 Mo. 131. In this last case, where one partner fraudulently disposed of all the partnership stock and effects, the vendees, who had received the property with knowledge of the fraud or without consideration, were *held* to be trustees thereof for the benefit of the firm. See Kirkpatrick *v.* Turnbull, Addison, 259; Rogers *v.* Batchelor, 12 Pet. 221. A purchase by one partner is governed by the same principle as a sale, and binds the copartnership, if made *bonâ fide* and without gross negligence on the part of the vendor. Bond *v.* Gibson, 1 Camp. 185; Dixon *v.* Alexander, 7 Ired. 4. See Walden *v.* Sherburne, 15 Johns. 422, 423; also, *ante*, ch. 6, § 3, as to the effect of stipulations between partners which are known to those who deal with them. And see Salomons *v.* Nissen, 2 T. R. 674; Treadwell *v.* Williams, 9 Bosworth, 649; Morrison *v.* Atwell, id. 503.

(*j*) In Metcalf *v.* Royal Exch. Ass. Co., Barnard. 343, it seems to be implied, that a pledge of partnership effects, in the exercise of a power which belongs to the general course of business of a trading partnership, is valid. See the remarks of Shaw, C. J., in Tapley *v.* Butterfield, 1 Metc. 515, where a mortgage by one partner of the whole stock in trade of a partnership, to secure a creditor, was *held* valid. Anderson *v.* Tompkins, 1 Brock. 456; Deckard *v.* Case, 5 Watts, 22. See also Milton *v.* Mosher, 7 Metc. 244; Brownrigg *v.* Rae, 5 Exch. 489; Sweetzer *v.* Mead, 5 Mich. 107. In *Ex parte* Lloyd, 1 Mont. & A. 494, it seems to have been considered that the peculiar circumstances of that case authorized one partner to bind his firm by an equitable mortgage. There, W., being the sole owner of certain freehold premises, entered into partnership with O., and W. & O. thenceforth occupied the premises as cotton spinners, and erected a steam-engine, &c., for the purposes of their joint trade. The firm being indebted to their bankers, O., in June, 1822, deposited with them the leases of certain leasehold premises, with a memorandum setting out a list of the title-deeds deposited, and concluding thus: "These papers are placed in the hands of Messrs. Jones, Lloyd, & Co., as security for what they may think fit to advance to O. & W." In August, 1822, W. also deposited with them a lease of a freehold piece of land, on which was situated a mill and other buildings, with the following memorandum: "These deeds of, &c., are placed in the hands of Messrs. Lloyd & Co., as security for what they may think proper to advance to O. & W., by W. The buildings alone are insured for upwards of 2,000*l.*; machinery, &c., 2,000*l.* more." O. & W. having become bankrupt, and the bankers petitioning to be declared equitable mortgagees of the premises, the court thought that, under the circumstances, there was no difficulty in finding that the one partner had authority to pledge the property, in order to obtain an advance of money for

*165 course he has this power. If it *does not, it may still be so far connected with, or so naturally arise out of or promote, their regular business, that if the transaction be an honest one, without bad faith on the part of any party, we should say it was a valid transaction, which the law would enforce. Perhaps a consideration of the authorities and of the reason of the case would lead to this difference between the selling and the assigning in pledge of partnership property by one partner. If the sale take place in the course of business, it would bind the other partners, as we have seen, though fraudulent as to them; but an assignment in pledge or mortgage, not being in the way of business, would bind the other partners, if it were done in good faith for the advantage of the firm, and was reasonable in itself, but not otherwise. (*k*)

Whether one partner may assign all the property in trust to pay creditors, the firm being insolvent, has been much doubted. That he may, in good faith, assign a part of the property to pay or secure an existing debt, or a debt to be contracted, is not doubted; (*l*) and we think the weight of authority

partnership purposes; and that W. might fairly be taken as mortgaging, for himself, his own freehold interest in the land and buildings, and as agent for the firm, mortgaging the leasehold interest and the property of the firm in the machinery.

(*k*) In the three following cases, where partnership property was pledged without any fraud or collusion, or any knowledge on the part of the pledgee of the interest of the firm in the pledge, the contract was held to bind the copartnership. Raba *v.* Ryland, Gow, 132; Tupper *v.* Haythorne, id. 135, n.; Reid *v.* Hollinshead, 4 B. & C. 867, s. c. 7 D. & R. 444. On the other hand, in *Ex parte* Copeland, 2 Mont. & A. 177, s. c. 3 Dea. & Ch. 199, two of the judges strongly intimate their opinion that, if at the time of a pledge by one partner the pledgee is conusant of the joint interest of the other partners, such pledge will not be valid as against the other partners. See *Ex parte* Gellar, 1 Rose, 297; Snaith *v.* Burridge, 4 Taunt. 684.

It appears, from the above cases, that there is no distinction between general partnerships and those for a particular adventure, as to the power in each partner to pledge, mortgage, &c., the partnership effects.

(*l*) See McClelland *v.* Remsen, 14 Abb. Prac. 332; Young *v.* Keighly, 15 Ves. 557; Mills *v.* Barber, 4 Day, 428; Fox *v.* Hanbury, Cowp. 445; Harrison *v.* Sterry, Cranch S. C. 289; Dana *v.* Lull, 17 Vt. 390. In Deming *v.* Colt, 3 Sandf. 290, Oakley, C. J., speaking of the law of New York, says that it is settled in that State, "that one partner may, from time to time, without the assent of his copartner, assign and deliver specific portions of partnership property to a creditor of the firm, in payment of a debt; that, inasmuch as it is in the power of one member of a firm to pay off a debt, he may pay it in a specific chattel actually delivered to the creditor, as well as in money." Anderson *v.* Tompkins, 1 Brock. 461; Hodges *v.* Harris, 6 Pick. 360; Tapley *v.* But-

sanctions his * assigning the whole property in trust for * 166
all the creditors, (*m*) especially if this be done without preference of any kind; (*n*) although this has been questioned on the ground that such a transfer of itself operates a dissolution; (*o*) but so, in fact, would * the previous and * 167

terfield, 1 Metc. 518; Havens *v.* Hussey, 5 Paige, 31, 32; Everet *v.* Strong, 5 Hill, 163, s. c. 7 id. 585; Kirby *v.* Ingersoll, 1 Hare (Mich.), 172, s. c. 1 Doug. (Mich.) 477; Cullum *v.* Bloodgood, 15 Ala. 34; Boswell *v.* Green, 1 Dutch. 390. See McNutt *v.* Strayhorn, 39 Penn. 269.

(*m*) It has been objected to the power of one partner to make a general assignment to trustees, for the benefit of creditors, of all the partnership effects, that such an act is beyond his implied power. See Hitchcock *v.* St. John, 1 Hoff. Ch. 511; Deming *v.* Colt, 3 Sandf. 284; Hayes *v.* Heyer, id. 293; Havens *v.* Hussey, 5 Paige, 30; Kirby *v.* Ingersoll, 1 Doug. (Mich.) 488; Dana *v.* Lull, 17 Vt. 394; Fisher *v.* Murray, 1 E. D. Smith, 341. See Mabbett *v.* White, 2 Kern. 442; Wetter *v.* Schlieper, 4 E. D. Smith, 707. The principal objections urged in some of the cases above cited seem to be sufficiently met by Chief Justice Marshall, in Anderson *v.* Tompkins, 1 Brock. 461. [One partner cannot assign all property for benefit of creditors, without the consent of the other, unless the other is so circumstanced that he cannot be consulted. Stein *v.* La Dow, 13 Minn. 412; Holland *v.* Drake, 29 Ohio St. 441.]

(*n*) Kirby *v.* Ingersoll, 1 Doug. (Mich.) 499; M'Cullough *v.* Sommerville, 8 Leigh, 415, 430, 436. See Einer *v.* Deynoodt, 32 Mo. 240, and 39 Mo. 69; Hook *v.* Stone, 34 Mo. 329; Stein *v.* La Dow, 13 Minn. 412.

(*o*) Per Washington, J., in Pearpoint *v.* Graham, 4 Wash. C. C. 232; per Walworth, Ch., in Havens *v.* Hussey, 5 Paige, 30; Kirby *v.* Ingersoll, 1 Doug. (Mich.) 477; Hughes *v.* Ellison, 5 Mo. 463; Hitchcock *v.* St. John, Hoff. Ch. 511; Dana *v.* Lull, 17 Vt. 390; per Denio, J., in Mabbett *v.* White, 2 Kern. 459, 462. See Simmons *v.* Curtis, 41 Me. 373. But to this objection, also, it is not perceived why Chief Justice Marshall has not furnished a satisfactory reply, in Anderson *v.* Tompkins, *supra*, pp. 461, 462.

As to what is actually established by the cases, it seems to be pretty generally admitted and laid down that one partner may make a valid general assignment of all the partnership property to trustees for creditors, if such an act is justified by the situation of the firm at the time, and if the other partners are absent from the country, or have made the assignor sole managing partner, or if in any other way, expressly or by implication, they may be supposed to have conferred upon the assigning partner sufficiently extensive authority. Anderson *v.* Tompkins, 1 Brock. 456; Robinson *v.* Crowder, 4 McCord, 519; Deckard *v.* Case, 5 Watts, 22; Harrison *v.* Sterry, 5 Cranch, 300; per Felch, J., in Kirby *v.* Ingersoll, 1 Doug. (Mich.) 489, 490; per Oakley, C. J., in Deming *v.* Colt, 3 Sandf. 291; M'Cullough *v.* Sommerville, 8 Leigh, 415, 433, 436; Fisher *v.* Murray, 1 E. D. Smith, 341; Robinson *v.* McIntosh, 3 id. 221; Kemp *v.* Camley, 3 Duer, 1. In Dickinson *v.* Legare, 1 Desaus. 537, the earliest case upon the subject, a contrary decision was made. But, in that instance, "the assignment, being made by a citizen of one of the United States during the existence of a war, to an alien enemy and in an enemy's country, was probably void by the laws of war, so far at least as to prevent its being carried into effect by any of the courts of this country." Per Chancellor Walworth, in Egberts *v.* Wood, 3 Paige, 524. And in effect the case is overruled by the subsequent case of Robinson *v.* Crowder, *supra*. See Kimball *v.* Hamilton Fire Ins. Co., 8 Bosworth, 495.

actual insolvency, in effect, though not technically. The almost universal establishment of insolvency systems in our States lessens the importance of this question.

If a partner die, the surviving partners may undoubtedly apply the effects of the partnership to the payment of its debts, without consulting at all the representatives of the deceased. (*p*)

The power of each partner over his own share or interest in the partnership property stands upon an entirely different footing from his power over the partnership property generally. It is certain that no partner has any exclusive right to any one or more things of the partnership. (*q*) If, in the case sup-

(*p*) Egberts *v.* Wood, 3 Paige, 517; Wilson *v.* Soper, 13 B. Mon. 411; though, where there is more than one survivor, one of them cannot assign the whole interest in the partnership effects to trustees, for the benefit of preferred creditors, without the concurrence of the other. Egberts *v.* Wood, *supra*. The remaining partners have the same rights as against an assignee of all one partner's interest. Clark *v.* Wilson, 19 Penn. St. 414. As to whether, when one of the partners is dormant, a deed of assignment of all the partnership property, by the other partner or partners, for the benefit of creditors, is valid without being executed by him, see Egberts *v.* Wood, *supra*; Drake *v.* Rogers, 6 Mo. 317. Whether the general partners in a limited partnership may make a general assignment of the joint funds, without the consent of the special partner, was doubted in Mills *v.* Argall, 6 Paige, 577.

(*q*) Hence no general principle of the law of partnership is better settled than that nothing is to be considered the share of any one partner but his proportion of the residue on the balancing of the partnership accounts. Accordingly, where a member of a copartnership sold and assigned to another "all his interest in and to the property, goods, wares, and merchandise, and debts belonging to the firm," *held*, that a debt owing by himself to the firm did not pass by the assignment; the interest of the assignor being only what remained over and above the amount of his indebtedness to the firm. Van Scoter *v.* Lefferts, 11 Barb. 140. See further Fox *v.* Hanbury, Cowp. 445; Smith *v.* De Silva, id. 469; West *v.* Skip, 1 Ves. 239; *Ex parte* Ruffin, 6 id. 119; *Ex parte* Williams, 11 id. 5; Taylor *v.* Fields, 4 id. 396, 559, 15 id. note; Holdernen *v.* Shackles, 8 B. & C. 612; Eddie *v.* Davidson, 3 Doug. 650; Pierce *v.* Jackson, 6 Mass. 243; Fisk *v.* Herrick, id. 271; Doner *v.* Stauffer, 1 Barr, 198; Church *v.* Knox, 2 Conn. 514, 518; Conwell *v.* Sandidge, 8 Dana, 278; Hodges *v.* Holeman, 1 id. 53; Pierce *v.* Tiernan, 16 Gill & J. 253; Commercial Bank *v.* Wilkins, 9 Greenl. 28; Murray *v.* Murray, 5 Johns. Ch. 70; Nicoll *v.* Mumford, 4 id. 522; Rodriguez *v.* Heffernan, 5 id. 428; Greene *v.* Greene, 1 Ohio, 251; Sumner *v.* Hampson, 8 Ohio, 330; Dyer *v.* Clark, 5 Metc. 575; Lingen *v.* Simpson, 1 Simons & S. 603. We shall be obliged to consider this question of the interest of one partner in partnership property more in detail, when we treat of the remedies of third persons against partners, and of partners *inter se*. See *post*, ch. 8 and 10. In Lovejoy *v.* Bowers, 11 N. H. 404, it was *held* that one partner cannot sell or mortgage an undivided interest in a specific part; the property belonging to the

posed * before, the partnership owning the cotton agreed *168
not to sell it, no one partner could separate ten bales, and say to a customer, The firm will sell nothing; but I will take these as my own, and will sell them to you. Such a sale would pass no title whatever. (*r*) The property sold would be available for the debts of the partnership; and so, perhaps, would any property into which it was converted, so long as that could be distinctly traced and identified. (*s*)

Any partnership would probably consent that a partner might take a part of their goods on his own account, and would charge the same to him. But without such consent, express or implied, it is quite clear that he can appropriate nothing to himself. Every partner owns the whole partnership property, subject to the equal ownership of every other partner; and no one partner can make his own ownership of any part absolute, and relieve it from the encumbrance of the ownership of the others without their consent. Because each partner owns the property of the firm, it has been held that one of two partners cannot be guilty of burglary or larceny as to a house or property owned by the firm. (*ss*)

But although no partner owns absolutely any part of the property, he has his own interest in the whole; which interest

partnership. The property constitutes a fund or capital to carry on the business of the partnership, and to pay partnership creditors; and the separate interest of each partner is an interest in the surplus. Morrison *v.* Blodgett, 8 N. H. 231.

(*r*) See Rogers *v.* Batchelor, 12 Pet. 221.

(*s*) Croft *v.* Pyke, 3 P. Wms. 180. In West *v.* Skip, 1 Ves. 239, Lord Chancellor Hardwicke asserted the general principle, that the "partner's lien" (which is nothing but the right of the partnership to its own property) is not appropriated to the original stock alone, but attaches to whatever is substituted in its place. He said that a partnership lien "is not considered as appropriated to the stock brought in, but to every thing coming in lieu during the continuance or after the determination of the partnership. As in Bucknal *v.* Roiston, Pre. Ch. 285, where a lien was held to be on those goods which were the produce of the original goods. So in Brown *v.* Heathcote, Michael. T. 1749, *held*, that it continued on what was the produce by way of barter and sale; and that holds much more strongly in the case of a partnership trade which cannot otherwise be continued." The cases of Skip *v.* Harwood, 2 Swanst. 586, and of Ridgley *v.* Carey, 4 Har. & M'H. 167, come yet nearer to the proposition of the text. Of course, however, this doctrine is not pushed to the extent of saying, that what at any time during the partnership has been part of the partnership effects shall in all future time remain part of the partnership effects, notwithstanding a *bonâ fide* transmutation. *Ex parte* Ruffin, 6 Ves. 119.

(*ss*) Alfele *v.* Wright, 17 Ohio, 238.

we have defined as an ownership of the whole, subject to the ownership of the other partners. And the question has repeatedly arisen, whether he can sell and transfer this interest. The answer, in general, is in the affirmative. (*t*) But a court of equity will not foreclose a mortgage made by a partner of his interest in the partnership property to secure his individual debt, if the property of the partnership will not more than pay the debts of the partnership. (*tt*)

It may be added, that while partners may own the partnership property in whatever proportions they choose, they are presumed, in the absence of evidence, to have equal interests. (*ttt*)

*169 *This power of sale must, however, be subject to many qualifications. It is plain, from what was said in the preceding section, that he cannot make his transferee a partner in his place, without the consent of the others. But, if he can transfer his interest at all, he must be able to give to the transferee some of his powers as partner, in order to make the transfer available. Thus, he must give to him the power of requiring an account and settlement of the concern, or, at least, some just and adequate ascertainment and setting off in severalty of his share. (*u*)

For this purpose, the transferee must go into equity; for it is not easy to see how he could, by means of trover or replevin or case or assumpsit, find a full and sufficient remedy. But, if he goes into equity, he must be prepared to do equity, and to submit to the application of the principles of equity to his case. If, therefore, the articles expressly forbid such transfer; or if they provide for a continuance for a time certain, or by any other provisions indirectly negative the right of transfer, or affix to it, as in the case of joint-stock companies, certain conditions and requirements, which have been disregarded; or if

(*t*) See Raymond's Case, 2 Rose, 255; Kingman *v.* Spurr, 7 Pick. 255; Gilmore *v.* Black, 2 Fairf. 488; Moddewell *v.* Keever, 8 Watts & S. 63; Ketcham *v.* Clark, 6 Johns. 144; Marquand *v.* N. Y. Manuf. Co., 17 id. 525; Mathewson *v.* Clark, 6 How. 122; Horton's Appeal, 13 Penn. St. 67; Bray *v.* Fromont, 6 Mod. 5; Wilson *v.* Bowden, 8 Rich. 9; Armstrong *v.* Fahnestock, 19 Md. 59; Norris *v.* Vernon, id. 13.

(*tt*) Jones *v.* Parsons, 25 Cal. 100.

(*ttt*) Moore *v.* Bare, 11 Iowa, 198.

(*u*) See preceding notes, and Nicoll *v.* Mumford, 4 Johns. Ch. 522; Rodriguez *v.* Heffernan, 5 id. 417; *Ex parte* Barrow, 2 Rose, 252.

the nature of the business, the especial purpose of the partnership, the method of transfer, or any of the circumstances attending it, make it impossible for the transfer to be enforced, — a court of equity would probably either refuse to sanction the transfer at all, or would attach to their enforcement of it conditions and provisions which would prevent it from working a mischief. Subject to these qualifications, we should say that every partner has, at common law, an unquestionable right of divesting himself, in good faith, of his interest in the partnership, in favor of a third party. But, taking them into consideration, we think it an accurate expression of the rule to say that no partner has a right to transfer the whole of his interest in the partnership stock to a stranger, unless he has a right to dissolve the partnership. Indeed, as we shall see in a subsequent chapter, such a transfer works a dissolution.

SECTION III.

OF THE FOUNDATION AND GENERAL EXTENT OF THE POWER OF A PARTNER.

1. *Of the Foundation of this Power.*

It is not unfrequently said that each partner is the agent of all the rest, and acts for them by possessing their authority. (*v*)

(*v*) Such is almost universally the doctrine of the authorities upon the subject. Watson, the earliest writer upon the Law of Partnership, in stating the principle upon which one partner's acts bind the rest, made use of language which has been quoted with approbation by all subsequent text-writers upon the same branch of law: "It may be laid down that partners are bound by what is done by one another in the course of the partnership business. Their liability under contracts is commensurate and coextensive with their rights. Although the general rule of law is, that no one is liable upon any contract except such as are privy to it, yet this is not contravened by the liability of partners, as they may be imagined virtually present at and sanctioning the proceedings they singly enter into in the course of trade; or as each vested with a power enabling them to act at once as principals and as the authorized agents of their copartners." Watson on Part. p. 167. So in Hawken *v.* Bourne, 8 M. & W. 703, Parke, B., says: "One partner, by virtue of that relation, is constituted a general agent for another, as to all matters within the scope of the partnership dealings, and has communicated to him, by virtue of that relation, all authorities necessary for carrying on the partnership, and all such as are usually exercised by partners in that business in which they are engaged." Fox *v.* Clifton, 6 Bing. 792, per Tindal, C. J.; Walden *v.*

We prefer to say that the authority of each partner rests on property quite as much as on agency, and arises from
*171 the nature and * purpose of the relation of partners, and must be found and illustrated only in and by the law of partnership. This distinction is material; for some confusion and error have arisen from deriving the definition and extent of the power too exclusively from the law of agency. We take the true theory to be, that as the common law recognizes corporations, as peculiar persons, governed by a peculiar but very complete system of law, so the law-merchant, which is now a part of the common law, recognizes partnerships as *quasi* corporations. They are something between individuals and corporations, and are not governed altogether by the laws applicable to either, but by their own law. They are like individuals, in that the names of the persons composing them are to be used in court, whether they be plaintiffs or defendants. But even the usual addition, "copartners under the firm and style of," &c., indicates the point wherein a partnership resembles a corporation, in being an aggregated body with an appellation which is proper to it, which is indeed its mercantile name, under which it does all mercantile business and signs all mercantile papers. We do not say that a partnership is a person in the sense in which the common law says that a corporation is one. But we say it is, or it has, a peculiar kind of personality, which must be understood and recognized if we

Sherburne, 15 Johns. 422; Van Keuren *v.* Parmelee, 2 Comst. 525; Western Stage Company *v.* Walker, 2 Clarke (Ia.), 512. In Winship *v.* Bank of the United States, 5 Pet. 561, Chief Justice Marshall thus declares his opinion of the basis upon which the power of one partner rests: "A partner, certainly the acting partner, has power to transact the whole business of the firm, whatever that may be, and consequently to bind his partners in such transactions as entirely as himself. This is a general power, essential to the well-conducting of business, which is implied in the existence of a partnership. When, then, a partnership is formed for a particular purpose, it is understood to be in itself *a grant of power* to the acting members of the company to transact its business in the usual way. If that business be to buy and sell, then the individual buys and sells for the company, and every person with whom he trades in the way of its business has a right to consider him as the company, whoever may compose it. It is usual to buy and sell on credit; and, if it be so, the partner who purchases on credit, in the name of the firm, must bind the firm. This is a general authority held out to the world, to which the world has a right to trust." But in Greeley *v.* Wyeth, 10 N. H. 16, Parker, C. J., says: "The authority of a partner is much more extensive than that of a mere agent."

would understand and apply aright the law of partnership. And we consider the individual partner, when conducting the affairs of the partnership, not so much as acting for himself because of his own interest, and then for the rest by their authority, but as acting for and representing this commercial personality. For it is one of the principal rules of the law which creates, defines, and governs this personality, that every one of those members who together constitute it has full power to represent it and act for it in all mercantile transactions within the scope of its business. And this power in each member is coequal with the power of every other member, excepting only such modification as may be derived from the articles of agreement which gave existence and form to this personality, or some subsequent modification of them.

2. *Of the General Extent of this Power.*

While the power of one partner is the same with the power of *every other, unless qualified by the articles, *172 the power of every partner — all being alike — may be qualified not only by the articles, but by the nature and limitations of their transactions, or the general usage of merchants, or the especial usage of persons engaged in that business, or even of that very firm. For out of all these sources may arise what might be called implied stipulations with each other.

Hence, this power of each partner to bind the firm is not confined to mere selling and buying, but extends over all contracts or obligations or acts fairly within the business of the firm. Numerous and various are the questions which have arisen as to the application of this principle, as well as the cases which answer these questions; and we endeavor to exhibit them in the note. (*w*) *This principle is generally *173

(*w*) Anon., 12 Mod. 446; Smith *v.* Baily, 11 id. 401; ——— *v.* Layfield, 1 Salk. 292, Holt, 434; De Tastet *v.* Carroll, 1 Stark. 88; Swan *v.* Steele, 7 East, 210; Sadler *v.* Lee, 6 Beav. 324; Blair *v.* Bromley, 2 Phillips, 354; Lacy *v.* M'Neile, 4 Dow. & R. 7; Winship *v.* Bank of the United States, 5 Pet. 529, 561, 5 Mason, 176; Tapley *v.* Butterfield, 1 Metc. 515; Brown *v.* Lawrence, 5 Conn. 397; Beck *v.* Martin, 2 McMullan, 260; Hawken *v.* Bourne, 8 M. & W. 703; Hill *v.* Voorhies, 22 Penn. St. 68. And, if a partnership engages in any transaction outside of its regular business, the acts

subject to the further limitations of usage, although the
* 174 general usage of merchants would impose * very little

and declarations of one partner, with respect to that transaction, bind the firm, as much as though they were made with respect to some matter in the course of its ordinary and customary business. Sandilands *v.* Marsh, 2 B. & Ald. 673. See *Ex parte* Gardom, 15 Ves. 286. So where the proprietors of several mail-coaches advertised that they would not be accountable for any parcels above the value of 5*l.*, except upon certain conditions, and A., one of the co-proprietors, who kept the coach-office, made a special agreement with the plaintiff, with respect to one coach, by which those conditions were dispensed with, it was *held*, that all the owners of the coaches in which A. was a partner, and by which the plaintiff's goods were sent, were bound by this special contract. Helsby *v.* Mears, 5 B. & C. 504, 8 Dow. & R. 289. See Dwight *v.* Brewster, 1 Pick. 50.

The general principle being, then, that one partner may act for his co-partnership in all transactions fairly within the business of the firm, we will cite the authorities which appear to determine what acts one partner in a mercantile house may ordinarily do. We have already shown that one partner may buy and sell, and may assign and transfer, by way of either pledge or mortgage, and in trust or otherwise, in the name of the partnership. See *ante*, ch. 7, § 2. He may also bind the firm by borrowing money, Rothwell *v.* Humphreys, 1 Esp. 406; Thicknesse *v.* Bromilow, 2 Cromp. & J. 425, 430, 431; Etheridge *v.* Binney, 9 Pick. 272; Whitaker *v.* Brown, 16 Wend. 505; Church *v.* Sparrow, 5 id. 223; Onondaga Co. Bank *v.* De Puy, 17 id. 47; Winship *v.* Bank of the United States, 5 Pet. 529, 5 Mason, 176; Lloyd *v.* Freshfield, 2 C. & P. 325; Miller *v.* Manice, 6 Hill, 119; Steel *v.* Jennings, Cheves, 183; Emerson *v.* Harmon, 14 Me. 271; Bascom *v.* Young, 7 Mo. 4; Hunt *v.* Hall, 8 Ind. 215; Hutchins *v.* Hudson, 8 Humph. 426; Hogan *v.* Reynolds, 8 Ala. 59; Saltmarsh *v.* Bower, 22 id. 221; and by lending it, Alexander *v.* Barker, 2 Cromp. & J. 133. [See also *ante*, p. * 103 and note.] He may also make payment for the firm, of the joint debts. Innes *v.* Stephenson, 1 Moody & R. 145; Tyson *v.* Pollock, 1 Barr, 375; Cheap *v.* Cramond, 4 B. & Ald. 663; Averell *v.* Lyman, 18 Pick. 351. See Campbell *v.* Mathews, 6 Wend. 551. He may compound them. Doremus *v.* McCormick, 7 Gill, 49, 65. See *Ex parte* Slater, 6 Ves. 146. Or he may take a release of them, which, though made to himself personally, and even though providing that those bound with him shall not be released (see Everard *v.* Herne, Litt. 191; Cocks *v.* Nash, 9 Bing. 341), will yet be a complete discharge of the whole firm. Hammon *v.* Roll, March, 202; Nedham's Case, 8 Rep. 136; Bower *v.* Twadlin, 1 Atk. 294, Co. Litt. 232, a; Collins *v.* Prosser, 1 B. & C. 682; Tuckerman *v.* Newhall, 17 Mass. 581; American Bank *v.* Doolittle, 14 Pick. 126; Wiggin *v.* Tudor, 23 id. 444; United States *v.* Thompson, Gilpin, 614; Barson *v.* Kincaid, 3 Penn. St. 57; Willings *v.* Consequa, Pet. C. C. 301, 307; Brown *v.* Marsh, 7 Vt. 327; Gray *v.* Brown, 22 Ala. 262. But a release to one partner, made with reference to a joint debt, to have the effect of discharging the firm must be a technical one under seal. Shotwell *v.* Miller, Coxe, 181; Shaw *v.* Pratt, 22 Pick. 305; Walker *v.* McCulloch, 4 Greenl. 421; Harrison *v.* Clare, 2 Johns. 449; Rowley *v.* Stoddard, 7 id. 207; De Zeng *v.* Bailey, 9 Wend. 336; Catskill Bank *v.* Messenger, 9 Cow. 37; Lunt *v.* Stevens, 24 Me. 534. Hence a covenant with one partner not to sue him will not discharge his copartners, since such an agreement of itself evinces an intention on the part of the partnership creditor to avoid the effects of a technical release to one of the firm. Hutton *v.* Eyre, 6 Taunt. 289; Bank of Chenango *v.* Osgood, 4 Wend. 607; Dran *v.* Newhall, 8 T. R. 168; Couch

other restriction than that already implied by the * requirement that these acts should always be within the * 175

v. Mills, 21 Wend. 424; Chandler *v.* Herrick, 19 Johns. 129; Goodnow *v.* Smith, 18 Pick. 416; Shed *v.* Pierce, 17 Mass. 623; McLellan *v.* Cumberland Bank, 24 Me. 566; Mason *v.* Jouett, 2 Dana, 107; Hosack *v.* Rogers, 8 Paige, 229. And even a release under seal to one partner, may, *it seems*, be accompanied with such provisos and conditions as to confine its operation to that one partner alone, and prevent it from discharging the firm. Solly *v.* Forbes, 4 Moore, 448; 2 Brod. & B. 38. See the language of Shaw, C. J., in Wiggin *v.* Tudor, 23 Pick. 444, 445.

Upon the same principle, if two are arrested on a joint *ca. sa.* for the amount of the damages obtained against them in an action of trespass, and the plaintiff discharges one of them upon his giving him his promissory note, this discharge of one operates as a release of both the defendants. Ballam *v.* Price, 2 J. B. Moore, 235. See Foster *v.* Jackson, Hob. 59. In like manner, if one of two joint debtors, who is in execution, obtains his discharge from the creditor, the debt is thereby satisfied as to the other debtor also. Clark *v.* Clement, 6 T. R. 525, 4 N. H. 175; Abel *v.* Forgue, 1 Root, 502. The partner may also receive payment of the debts due to the partnership. Anon., 12 Mod. 447; Duff *v.* The East India Company, 15 Ves. 198; Tomlin *v.* Lawrence, 3 Moore & P. 555; M'Kee *v.* Stroup, Rose, 291; Gregg *v.* James, Breese, 107; Yandes *v.* Lefavour, 2 Blackf. 371; Allen *v.* Farrington, 2 Sneed, 526; Porter *v.* Taylor, 6 Moore & S. 156; King *v.* Smith, 4 Car. & P. 108; Brasier *v.* Hudson, 9 Sim. 1. See Henderson *v.* Wild, 2 Camp. 561; Pritchard *v.* Draper, 1 Rus. & M. 191; Jacaud *v.* French, 12 East, 317. He may compromise them. Pierson *v.* Hooker, 3 Johns. 70; Cunningham *v.* Littlefield, 1 Edw. Ch. 104; Doremus *v.* McCormick, 7 Gill, 49, 65. Or he may release them, and this even by deed. But though a partner may release a joint debt in his own name only, a covenant by him personally, not to sue a debtor of the partnership, does not amount to a release of the debt, nor prevent the firm from bringing an action for it in the names of all the partners. In such case, the remedy of the partnership debtor is against the covenanting partner, for the breach of covenant. Walmsley *v.* Cooper, 3 Per. & D. 149. One partner has power to represent and to act for the firm in legal proceedings. Thus, one partner may, for himself and his copartner, sign a note for the weekly payment under the Lords' Act. Meux *v.* Humphrey, 8 T. R. 25; Burton *v.* Issitt, 5 B. & Ald. 267. So, if two partners commence an action, one may release the subject-matter of it, which release will be binding upon his copartner, and operate as a bar to the action. Barker *v.* Richardson, 1 Younge & J. 362; Arton *v.* Booth, 4 J. B. Moore, 192; Furnival *v.* Weston, 7 id. 356; Jones *v.* Herbert, 7 Taunt. 421; Wilson *v.* Mower, 5 Mass. 411. So, if a bill is drawn by a firm, and one of the partners agrees with the acceptor to provide for it when due, this operates as a release to the acceptor of any action that might have been brought upon the bill, notwithstanding any fraud on the part of the single partner as against his copartners. Richmond *v.* Heapy, 1 Stark. 202; Johnson *v.* Peck, 3 id. 66; Sparrow *v.* Chisman, 9 B. & C. 241. Upon the same principle, one partner may suspend proceedings in an action by the firm. Harwood *v.* Edwards, cited in Gow on Part. 65. See Loring *v.* Brackett, 3 Pick. 403. Hence, if for a previous debt one partner draw a bill upon a debtor of the firm, which is accepted by him, and is taken by the partner in payment, this is giving time to the debtor, though the bill was drawn in that one partner's name alone; and the debtor cannot be sued for the amount of the debt till the bill has arrived at maturity and been dishon-

regular business of the firm. (*x*) And if a contract be made by one partner in the name of the firm with a stranger, if the

ored. Tomlin *v.* Lawrence, 3 Moore & P. 585. So, in an action against the firm, one partner may enter an appearance for the rest. *D. arguendo,* Harrison *v.* Jackson, 7 T. R. 208; Bennett *v.* Stickney, 17 Vt. 531; Taylor *v.* Coryell, 12 S. & R. 243, 250. See, however, *contra,* Haslet *v.* Street, 2 McCord, 310; Loomis *v.* Pierson, Harp. 470; Hills *v.* Ross, 3 Dallas, 331, note; Bright *v.* Sampson, 20 Tex. 21. [See also Hall *v.* Lanning, 91 U. S. 160.] It seems, that service of process should be made on each partner personally. Moredon *v.* Wyer, 6 M. & G. 278, and note; Demoss *v.* Brewster, 4 S. & M. 661. See Bennett *v.* Stickney, *supra;* Phelps *v.* Brewer, 9 Cush. 390. In equity, however, where one of two partners was abroad, service of subpœna upon the other partner has been held good service upon both. Carrington *v.* Cantillon, Bunb. 107; Coles *v.* Gurney, 1 Madd. 187. And in Lansing *v.* M'Killup, 7 Cow. 416, service of declaration upon one of a firm of attorneys, whose name did not appear on the record as attorney for the defendant, the business of the firm being done in the name of the other partner, was yet held good and regular service. [Alexander *v.* Stern, 41 Tex. 193.] See *contra,* Young *v.* Goodson, 2 Russ. 255. The power of one partner to act for the firm in the matters incident to a suit finds an exception (founded, for the most part, upon a purely technical reason) in this, that one partner cannot, by virtue of his implied authority, confess judgment in the name of the firm, nor consent to an order for that purpose. [But it was recently held in Pennsylvania that, where a firm note was given with a warrant to confess judgment by one of the partners, execution might be had on the partnership property. Ross *v.* Howell, Sup. Ct. Penn., 3 L. & Eq. Reptr. 694.] See next note. As in legal proceedings generally, so in those under the Bankrupt Laws, the act of one partner is the act of his

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(*x*) Anon., 2 Ca. Ch. 38, 16 Vin. Ab. 242; *Ex parte* Agace, 2 Cox, 312; Livingston *v.* Roosevelt, 4 Johns. 251; Lawrence *v.* Dale, 3 Johns. Ch. 23, 17 Johns. 427; Rogers *v.* Batchelor, 12 Pet. 221; Eastman *v.* Cooper, 15 Pick. 276; Marsh *v.* Gold, 2 id. 285; Nichols *v.* Hughes, 2 Bailey, 109; Thomas *v.* Harding, 8 Greenl. 417; Walcott *v.* Canfield, 3 Conn. 198; Wagnon *v.* Clay, 1 A. K. Marsh. 257; Goode *v.* Linecurn, 1 How. (Miss.) 281; Goodman *v.* White, 25 Miss. 163. The giving of guarantees for the debts of third parties is not a part of the regular course of business of an ordinary mercantile house, and is not, therefore, within the power of one partner. See *post,* § 4. Nor is the receiving of notes for other persons, and undertaking to collect them. Hogan *v.* Reynolds, 8 Ala. 59. And, though every partner has an implied authority to borrow money generally, he is not thereby necessarily empowered to bind the firm by a loan of money for the purpose of increasing the fixed capital of the concern. Fisher *v.* Tayler, 2 Hare, 218. See Greenslade *v.* Dower, 7 B. & C. 635. [A partner cannot bind his copartners, by a banking account opened by him in his own name in behalf of the firm. Alliance Bank *v.* Keasley, L. R. 6 C. P. 433.] So, notwithstanding the power of disposal which each partner possesses with respect to the joint property, he cannot give it away. Daniel *v.* Daniel, 9 B. Mon. 195. Finally, the manner in which a particular firm has been in the habit of managing its business may greatly vary and enlarge the power which, under ordinary circumstances, that particular trade would confer upon one partner. See Woodward *v.* Winship, 12 Pick. 430.

transaction is foreign to the usual course of dealing with the firm, this circumstance lays on the stranger the duty and

partnership. Thus, to sustain a fiat, one partner may make affidavit of debt, and execute the usual bond. *Ex parte* Hodgkinson, 19 Ves. 291; 2 Rose, 174; *Ex parte* Peele, Buck, 457. He may "prove a debt, vote in the choice of assignees, and sign the certificate," in behalf of the firm. Per Lord Eldon in *Ex parte* Hodgkinson, 19 Ves. 293; *Ex parte* Mitchell, 14 id. 597; *Ex parte* Shaw, 1 Glyn & J. 129; *Ex parte* Bank, 2 id. 363; *Ex parte* Hall, 1 Rose, 2; *Ex parte* Bignold, 2 Mont. & A. 655. He may, by power of attorney, authorize some third person to vote in the choice of assignees, and to sign the certificate, &c., for the partnership. *Ex parte* Mitchell, *supra*; *Ex parte* Shaw, *supra*. He may sign a petition presented for a hearing. See *Ex parte* Morgan, Buck, 109; *Ex parte* Cox, 1 Glyn & J. 355, note; *Ex parte* Fife, 2 Mont. & A. 577. And he may bind the firm in all other proceedings in bankruptcy, except in the case of a petition for a fiat, in which all the partners must join. Buckland *v.* Newsame, 1 Taunt. 477; *Ex parte* Peele, Buck, 457; Arch. B. L. vol. 2, p. 5. See Pierce *v.* Stockwell, 11 Cush. 236. One partner may also bind the firm by effecting insurances upon the joint property. But a part-owner has no such implied authority. Hooper *v.* Lusby, 4 Camp. 66. See Irving *v.* Excelsior Fire Ins. Co., 1 Bosw. 507; Graves *v.* Boston Marine Ins. Co., 2 Cranch, 419; Foster *v.* United States Ins. Co., 11 Pick. 85. One partner may also, in the course of the joint business, take a guaranty, which, if so intended, shall inure to the benefit of the firm. Garrett *v.* Handley, 4 B. & C. 664; Walton *v.* Dodson, 3 Car. & P. 162. One partner has also power to appoint an agent to transact the joint business, and to bind the partnership by his acts relative thereto. Tillier *v.* Whitehead, 1 Dallas, 269; Lucas *v.* Bank of Darien, 2 Stewart, 280, 297; Coons *v.* Renick, 11 Tex. 134. See Robinson *v.* Hofman, 4 Bing. 562. So, also, where a partnership is by name empowered to act for a third party, one partner may execute the agency so as to bind the principal. Gordon *v.* Buchanan, 5 Yerger, 71, 82; Beck *v.* Martin, 2 McMullan, 260; Kennebec Co. *v.* Augusta Ins. & Bank Co., 6 Gray, 204. But from a general power of attorney granted to one of two partners the other can derive no authority. Edmiston *v.* Wright, 1 Camp. 88. These powers of a partner exist, though some of the partners be secret or dormant. Winship *v.* Bank of the United States, 5 Pet. 529; Swan *v.* Steele, 7 East, 210; Wintle *v.* Crowther, 1 Cromp. & J. 316. Though it has been *held*, that, if there be *actual* fraud in the original formation of the partnership, a dormant partner who has received none of the funds will not be liable to creditors upon contracts made by the ostensible partners. Mason *v.* Connell, 1 Whart. 381; Wood *v.* Connell, 2 id. 542. Nor does it affect the power of each partner, that the partners are trustees, and that the joint business is carried on for the benefit of their *cestui que trusts*. Thicknesse *v.* Bromilow, 2 Cromp. & J. 425. As to the effect of fraud, see Dickson *v.* Alexander, 7 Ired. 4; Emerson *v.* Harmon, 14 Me. 271; Bascom *v.* Young, 7 Mo. 1, 4; Steel *v.* Jennings, Cheves, 183; M'Kee *v.* Stroup, Rice, 291. See Halls *v.* Coe, 4 McCord, 136; Henderson *v.* Wild, 2 Camp. 561; Jones *v.* Herbert, 7 Taunt. 421; Arton *v.* Booth, 4 J. B. Moore, 192; Furnival *v.* Weston, 7 id. 356; Bignold *v.* Waterhouse, 1 Maule & S. 255; Farrar *v.* Hutchinson, 9 A. & E. 641; Loyd *v.* Freshfield, 2 C. & P. 325; Barker *v.* Richardson, 1 Younge & J. 362; Mountstephen *v.* Brooke, 1 Chitty, 391. In Eastman *v.* Wright, 6 Pick. 323, Morton, J., said: "In England, when a nominal plaintiff, or one of several plaintiffs, releases an action in fraud of the party in interest, the

responsibility of inquiring and ascertaining whether the partner has the authority of the firm. (*xx*)

3. *Of the Power to Submit to Arbitration.*

*176 *A seeming exception exists in relation to arbitration; for, while a copartner may create a debt, or pay a debt, or compromise a debt, or, in good faith, deal with it in any other way, the one thing which it is said he cannot so do as to bind his copartners is to submit the debt to arbitra-
*177 tion. (*y*) Of the reasons given for *this, one, that

court directly interfere, and set aside the release. But in this State the courts have never exercised that power. The release may be avoided, if fraudulent; but the question of fraud can only be tried by jury." The effect of stipulations between partners upon the power of any one or more of them, when those stipulations are known to third parties, we have already considered. See *ante*, ch. 6, § 3. For their effect when unknown, see *post*, ch. 7, § 7.

(*xx*) Calwallader *v.* Kroesen, 22 Md. 204.

(*y*) And this continues true, whether the submission be under seal or not. Stead *v.* Salt, 3 Bing. 101. But see Hallack *v.* March, 25 Ill. 48, and cases there cited. A firm of five members declared against the defendant for work, labor, materials, &c. The defendant pleaded the general issue, and put in an award upon the matter touching which the action had been brought. The articles containing the submission, however, were signed by only three of the partners. *Held*, that the submission was insufficient, and could not bind the firm. Hambidge *v.* De La Croúe, 3 C. B. 744, 745. In Adams *v.* Bankart, 1 Cromp., M. & R. 685, Lord Abinger, C. B., said: "I think we have sufficient authority for saying, that one partner cannot bind another by a submission to arbitration, without the assent of the latter." Karthuas *v.* Ferrer, 1 Pet. 228; [Hall *v.* Lanning, 91 U. S. 160; Martin *v.* Thrasher, 40 Vt. 460;] Gibson, C. J., in Harper *v.* Fox, 7 Watts & S. 143; Buchanan *v.* Curry, 19 Johns. 137; Harrington *v.* Higham, 13 Barb. 660; Buchoz *v.* Grandjean, 1 Mann. (Mich.) 367; Wood *v.* Shepherd, 2 Patton & H. 442; Jones *v.* Bailey, 5 Cal. 345. See Boyd *v.* Emmerson, 2 A. & E. 184; Skillings *v.* Coolidge, 14 Mass. 43, 45; Martin *v.* Thrasher, 20 Vt. 460. Respecting the mode of showing the authority of one partner to bind his firm by a submission, Lord Abinger, C. B., said, in Adams *v.* Bankart, *supra*: "I do not mean to say that such assent must be given in any particular form of words, or that it requires to be under the hand of the copartner: all that is necessary is, that there should be some evidence of an actual authority conferred." And Parke, B., in the same case: "I am entirely of the same opinion. The authority to bind a partner to submit to arbitration does not flow from the relation of partnership; and, where it is relied upon, it must, like every authority, be proved either by express evidence, or by such circumstances as lead to the presumption of such an authority having been conferred."

When a submission is made of all matters of difference between an individual and a partnership, it includes only such matters as are in dispute between that individual and the partnership jointly, and not those in

submission to arbitration is no mercantile transaction, and could not have entered into the minds of the partners when entering into partnership, seems to us to beg the question, and to be a very feeble reason; (*z*) and another, that it may compel the partners, by force of the award, to do things never contemplated by them, and in no sense mercantile, seems to have little more force. (*a*) The true reason is, that the law, while it favors arbitration in many respects and ways, on the other hand is jealous of it. The courts are, or until a very recent period (*b*) have been, unwilling to enforce or sanction an agreement by which parties are compellable to renounce the perfectly impartial and well-constituted tribunal which is open to all the public, for one which the parties construct themselves, and which is open to very many possibilities of error. (*c*)

Hence both law and equity have refused to permit a partner so to bind himself and his copartners by an agreement to submit a question as to oust them of their jurisdiction. But if a partner made such a submission, and it was followed by an award, and the award and submission were honest and reasonable, and the partner thereon agreed that his firm should do the thing awarded, we think this would now be held, in equity at least, as obligatory on the partnership. (*d*)

Indeed, if all the partners agreed to submit a question to referees, and then refused to perform their promise, this prom-

dispute between that individual and one or more of the partners severally. Garland *v.* Noble, 1 J. B. Moore, 187.

(*z*) Stead *v.* Salt, 3 Bing. 103; Adams *v.* Bankart, 1 Cromp., M. & R. 681.

(*a*) In Boyd *v.* Emerson, 2 A. & E. 184, one question raised was, whether one partner could bind his copartners by a parol submission to arbitration. The court did not think it necessary to decide the point. The argument of counsel, however, in favor of this power in one partner is worthy of attention.

(*b*) See for cases questioning, and to some extent overruling, the ancient principle, that the courts will not enforce an agreement to refer, Scott *v.* Avery, 8 Exch. 487, 20 Eng. Law & Eq. 327, 8 Exch. 497, 20 Eng. L. & Eq. 334, 5 H. L. Cas. 811, 36 Eng. L. & Eq. 1, 13; Livingstone *v.* Ralli, 5 Ellis & B. 132, 30 Eng. L. & Eq. 279; Horton *v.* Soyer, 4 H. & N. 643; Russell *v.* Pellegrini, 6 Ellis & B. 1020, 38 Eng. L. & Eq. 99. See also Cobb *v.* New England Mut. M. Ins. Co., 6 Gray, 192, 204. An English statute, 17 & 18 Vict. c. 125, § 11, provides, that when there is such an agreement, and an action is brought in violation of it, the court may grant a rule to stay proceedings, at the request of the defendants. See *post*, p. * 247.

(*c*) Harrington *v.* Higham, 13 Barb. 660.

(*d*) Buchanan *v.* Curry, 19 Johns. 137.

ise, made by the whole, might not only be enforced by decree for specific performance, but it would be a good contract at law, as all such agreements to refer are, and the party refus-
*178 ing might be * sued for his breach of promise. (*e*) And in some of our States, the power of a partner to bind the partnership, by his unsealed agreement to refer a question in which the partnership was interested, has been held as matter of law. (*f*) And we have some doubt whether any of our courts might not now be expected to sustain such a submission, if it were in itself unobjectionable.

4. *Of the Power to Affix a Seal.*

The contracts of a firm should be unsealed; for, on this point, the common law certainly controls the law of partnership. No partnership has a seal, and no partner can affix the seals of his copartners, or of any of them, without their express authority. While this seems to be a settled rule, there has been a great extent and some variety of adjudication in regard to it, as we show in the note. (*g*) Perhaps the old

(*e*) So, if one member of a firm enter into a submission in behalf of himself and his partners, and undertake that the copartnership shall perform the award, the acting partner is bound, though the firm is not; and a refusal by his copartners to be bound by the arbitration will be a breach of that partner's promise, for which he may be held liable in damages. Thus, in Com. Dig. "Arbitrament" (D. 2), it is said: "If there be a controversy between A. of the one part, and B. and C. of the other, and B. submits for himself and C., and there be an award that B. shall pay; this is good, though C. be a stranger." Strangford *v.* Green, 2 Mod. 228; McBride *v.* Hagan, 1 Wend. 326, 336; Buchanan *v.* Curry, 19 Johns. 137, 143; Armstrong *v.* Robinson, 5 Gill & J. 412, 422; Wood *v.* Shepherd, 2 Patton & H. 442; Jones *v.* Bailey, 5 Cal. 345.

(*f*) Southard *v.* Steele, 3 B. Mon. 435; Taylor *v.* Coryell, 12 S. & R. 243; Wilcox *v.* Singletary, Wright, 420.

(*g*) The contrary seems to have been *held*, in one *nisi prius* case, Mears *v.* Serocold, cited by Dampier, *arguendo*, in Harrison *v.* Jackson, 7 T. R. 208. But for authorities against the power of a partner to bind his firm by a seal, see Thomason *v.* Frere, 10 East, 418; Metcalfe *v.* Rycroft, 6 Maule & S. 75; Hall *v.* Bainbridge, 1 Man. & G. 42; McKee *v.* Bank of Mt. Pleasant, 7 Ohio, 175; McNaughten *v.* Partridge, 11 id. 223; Trimble *v.* Coons, 2 A. K. Marsh. 375; Southard *v.* Steele, 3 T. B. Mon. 435; Gerard *v.* Basse, 1 Dall. 119; Hart *v.* Withers, 1 Penn. St. 285; Green *v.* Beals, 2 Caines, 254; Clement *v.* Brush, 3 Johns. Cas. 180; Skinner *v.* Dayton, 19 Johns. 513; Mills *v.* Barber, 4 Day, 428; Garland *v.* Davidson, 3 Munf. 189; Tuttle *v.* Eskridge, 2 id. 330; Shelton *v.* Pollock, 1 Hen. & M. 422; Posey *v.* Bullitt, 1 Blackf. 99; Fisher *v.* Tucker, 1 McCord Ch. 169; Nunnely *v.* Doherty, 1 Yerg. 26; Blackburn *v.* McCallister, Peck, 371; Anon., Taylor, 113; Anon., 2 Hayw. 99; Person *v.* Carter, 3 Murphy, 321; Case of James Taylor, 1 Browne, Penn. App.

technical rule, that the *authority to seal must be by *179
seal, (*h*) would not be strictly applied; *but, generally, *180

lxxiii.; Cady *v.* Shepherd, 11 Pick. 400; Van Deusen *v.* Blum, 18 id. 229; United States *v.* Astley, 3 Wash. C. C. 508; Fleming *v.* Dunbar, 2 Hill (S. C.), 532; Sloo *v.* State Bank of Illinois, 1 Scam. 441; Cummins *v.* Cassily, 5 B. Mon. 75; Montgomery *v.* Boone, 2 id. 244; Button *v.* Hampson, Wright (O.), 93; Ford *v.* Haft, id. 118; Layton *v.* Hastings, 2 Harr. 147; Morris *v.* Jones, 4 id. 428; Albers *v.* Wilkinson, 6 Gill & J. 358; Lucas *v.* Sanders, 1 McMullan, 311; Napier *v.* Catron, 2 Humph. 534; Smith *v.* Tupper, 4 Smedes & M. 261; Snyder *v.* May, 19 Penn. St. 235; County *v.* Gates, 26 Mo. 315. Hence, custom-house bonds, signed and sealed by one partner, though in the name of and for duties on goods imported by and belonging to the partnership, are yet, at common law, not binding on the firm, but only on the executing member. Tom *v.* Goodrich, 2 Johns. 213; Walden *v.* Sherburne, 15 id. 409, 423; United States *v.* Astley, 3 Wash. C. C. 508. But so much practical inconvenience has been found to result from this application of the doctrine that, by act of Congress of March 1, 1823, stat. 2, ch. 21, § 25, it was provided that any bond to the United States entered into for the payment of duties by a merchant belonging to a firm, in the name of such firm, shall equally bind the partner or partners in trade of the person or persons by whom such bond shall have been executed. 3 U. S. Statutes at Large (ed. 1846), 737. [One partner cannot bind the others by a specialty. Walton *v.* Tresten, 49 Miss. 569; Gibson *v.* Warden, 14 Wall. (U. S.) 224. And, if the contract be such an one as does not require a seal, it is nevertheless invalid. The contract under seal is *ultra vires*, and there is no other contract. Schmertz *v.* Shreever, 62 Penn. St. 457; Russell *v.* Annable, 109 Mass. 72, Wells, J., dissenting. If one partner authorizes another to procure an indorser on a note to be offered for discount, he authorizes him to mortgage all the stock in trade to secure the indorser, Patterson *v.* Maughan, 39 U. C. Q. B. 371; and, generally, such acts as may be reasonably necessary to accomplish the authorized act, Halpenny *v.* Pennock, 33 U. C. Q. B. 229.]

The same principles of the common law which operate to disable a partner from binding his copartners by specialty, must, it should seem, still more completely incapacitate him to bind them, without their distinct assent, by a voluntary confession of judgment. *A fortiori*, he cannot, by virtue of his implied power, authorize another to do it, even though the authority be not under seal. Green *v.* Beals, 2 Caines, 254; Crane *v.* French, 1 Wend. 311; McBride *v.* Hagan, id. 335; Grazebrook *v.* M'Creedie, 9 id. 437; Waring *v.* Robinson, 1 Hoff. Ch. 524; Gerard *v.* Basse, 1 Dall. 119; McKee *v.* Bank of Mt. Pleasant, 7 Ohio, 175; Remington *v.* Cummings, 5 Wis. 138; Hull *v.* Garner, 31 Miss. 145; Lagow *v.* Patterson, 1 Blackf. 252; Barlow *v.* Reno, id.; Sloo *v.* The State Bank of Illinois, 1 Scam. 428; Waring *v.* Robinson, 1 Hoff. Ch. 525; Harper *v.* Fox, 7 Watts & S. 142; Bitzer *v.* Shunk, 1 id. 340; Cash *v.* Tozer, id. 519; Overton *v.* Tozer, 7 Watts, 331; Bennett *v.* Marshall, 2 Mills, 436; Grier *v.* Hood, 25 Penn. St. 430; Morgan *v.* Richardson, 16 Mo. 409; Binney *v.* Le Gal, 19 Barb. 592; per Wilde, C. J., Hambidge *v.* De La Crouée, 3 C. B. 744. See Brutton *v.* Barton, 1 Chitty, 707; Kinnersley *v.* Mussen, 5 Taunt. 264. [Hall *v.* Lanning, 91 U. S. 160, holds

(*h*) See Steiglitz *v.* Egginton, Holt, 141; Berkeley *v.* Hardy, 5 B. & C. 355; Trimble *v.* Coons, 2 A. K. Marsh. 375; Cummins *v.* Cassily, 5 B. Mon. 74; Hart *v.* Withers, 1 Barr, 285; Pickering *v.* Holt, 6 Greenl. 160; Blood *v.* Goodrich, 9 Wend. 75, 76, 12 id. 525.

*181 at least, authority there must be. (*i*) An * important limitation to the operation of the rule occurs in proceedings

that one partner after dissolution has no authority to enter an appearance for the firm, in a suit against it; and a judgment founded on such an appearance is void. In case the other members resided out of the State. *A fortiori* such a judgment would be void, if the other partners could be reached by process.] But if a voluntary judgment be confessed by one partner against his firm, the judgment is binding upon that partner, and will not be set aside upon his application. Nor will it be *altogether* set aside upon the application of the other partners; but the court will amend the judgment by ordering their names to be struck out, and otherwise correcting it so that they shall not be bound, or will order execution to be served on the person and estate of the acting partner only, or that only his several interest in the partnership property shall be sold. Motteux *v.* St. Aubin, 2 W. Bl. 1133; Green *v.* Beals, 2 Caines, 254; Crane *v.* French, 1 Wend. 311; St. John *v.* Holmes, 20 id. 609; Gerard *v.* Basse, 1 Dall. 119; Bitzer *v.* Shunk, 1 Watts & S. 340; Harper *v.* Fox, 7 id. 142; Morgan *v.* Richardson, 16 Mo. 409. See Grier *v.* Hood, 25 Penn. St. 430; Smith *v.* Tupper, 4 Smedes & M. 261; Overton *v.* Tozer, 7 Watts, 331; Cash *v.* Tozer, 1 Watts & S. 519. See Sloo *v.* State Bank of Illinois, 1 Scam. 428. [A., a member of a firm, confessed judgment against himself for a firm debt. *Held*, that the partnership property might be levied on to satisfy this judgment. Ross *v.* Howell, 4 W. N. 25, S. C. 3 L. & Eq. Reptr. 694.] Though one partner, by the execution for his copartners and himself of a sealed instrument, cannot bind them, yet he always binds himself. This rule is one derived from the law of agency, and regards each partner, not as standing for and representing the partnership, but as the agent of all his copartners, and consequently as always making himself liable, when, from want of sufficient authority, he fails to bind those for whom he attempts to act. Elliot *v.* Davis, 2 Bos. & P. 338; Hawkshaw *v.* Parkins, 2 Swanst. 543; Trimble *v.* Coons, 2 A. K. Marsh. 375; Williams *v.* Hodgson, 2 Harris & J. 474; Layton *v.* Hastings, 2 Harrison, 147; Skinner *v.* Dayton, 5 Johns. Ch. 351, 19 Johns. 513; Clement *v.* Brush, 3 Johns. Cas. 180; Gates *v.* Graham, 12 Wend. 53; Jackson *v.* Stanford, 19 Ga. 14. See, however, Sellers *v.* Streator, 5 Jones, 261; also, *supra*, note (*e*). Thus, if one only of three partners execute a deed of assignment, purporting to convey all the personal property of the three to trustees, for the benefit of creditors, such a deed will pass the share of the executing partner. Bowker *v.* Burdekin, 11 M. & W. 128. See Dutton *v.* Morrison, 17 Ves. 193; Hughes *v.* Ellison, 5 Mo. 463. But if one partner executes a sealed instrument for himself and his partners, and suit is brought against all, there can be no recovery in that suit against the executing partner. Hart *v.* Withers, 1 Penn. St. 285. So, if a partner signs and seals a deed of composition in the name and firm of himself and partner, he alone is entitled to bring covenant thereon. Metcalf *v.* Rycroft, 6 Maule & S. 75. See Gates *v.* Graham, 12 Wend. 53. By contract under seal, purporting to be made between the plaintiffs and the firm of B. & T., the former agreed to erect a certain dam for the uses of the partnership. The contract was signed with the name of the partnership by B., and a seal affixed thereto. *Held*, that B., not having authority thus to bind his copartners, the firm were not liable on the specialty, but were liable on an implied promise for the work done, and the materials furnished by the plaintiffs to their benefit. Van Deusen *v.* Blum, 18 Pick. 229. See Sellers *v.* Streator, 5 Jones, 261; Fox *v.* Norton, 9 Mich. 207.

(*i*) It seems to be established in Eng-

in bankruptcy; (*j*) and in the case of a release to a joint debtor of a partnership claim; in both of which instances one

land (and this is also the doctrine of some early American cases), that, to bind his copartners by specialty, a partner must have a special authority under seal. The requisite authority is not conferred by a general partnership agreement under seal. Harrison *v.* Jackson, 7 T. R. 207; Steiglitz *v.* Egginton, Holt, 141; Horsley *v.* Rush, cited, *arguendo*, 7 T. R. 209. See Williams *v.* Walsby, 4 Esp. 220; Napier *v.* Catron, 2 Humph. 534. Nor does the doctrine, which is universally received as well in this country as in England, that one partner may execute a valid deed on behalf of his firm, if his copartners are present and consent thereto, constitute any exception to the general rule; for, in this case, the act of the executing partner is considered the act of all. Lovelace's Case, W. Jones, 268; Shep. Touch. 55; Fitz. Abr. tit. "Feoffment," pl. 105; Com. Dig. "Fait" (A. 2); Burn *v.* Burn, 3 Ves. 578; Ludlow *v.* Simond, 2 Caines Cas. 1, 42, 55; MacKay *v.* Bloodgood, 9 Johns. 285; McWhorter *v.* McMahan, 1 Clarke Ch. 400; Halsey *v.* Whitney, 4 Mason, 232; Darst *v.* Roth, 4 Wash. C. C. 471; Anthony *v.* Butler, 13 Pet. 423, 433; Hart *v.* Withers, 1 Penn. St. 285, 291; Fichthorn *v.* Boyer, 5 Watts, 159; Overton *v.* Tozer, 7 id. 333; Potter *v.* McCoy, 26 Penn. St. 458; Flood *v.* Yandes, 1 Blackf. 102; Modisett *v.* Lindley, 2 id. 120; Henderson *v.* Barber, 6 id. 28; M'Arthur *v.* Ladd, 5 Ohio, 514, 517; Pike *v.* Bason, 21 Me. 287; Fleming *v.* Dunbar, 2 Hill (S. C.), 533; Freeman *v.* Carhart, 17 Ga. 348; Lee *v.* Onstott, 1 Pike, 206, 218; Day *v.* Lafferty, 4 id. 450. The doctrine is the same in equity as at law. Burn *v.* Burn, *supra;* 1 Hov. Supp. 410. See Smith *v.* Winter, 4 M. & W. 454; Palmer *v.* Justice Assurance Co., 6 Ellis & B. 1015, 38 Eng. L. & Eq. 83. While, then, in England, the common-law doctrines in reference to the execution of sealed instruments have, as far as partners are concerned, undergone but little, if any, modification, the American cases have made great and decided innovations. Thus, in most of the States, it is well established that a partnership will be bound by a deed executed by one partner on its behalf, provided the act of such partner have from his copartners either a previous parol authority or a subsequent parol ratification. The grounds of this qualification of the old rule of the common law are clearly and forcibly stated in the opinion of Mr. Chief Justice Jones, in Gram *v.* Seton, 1 Hall, 262. This opinion includes a very elaborate review of all the leading authorities upon the subject. For cases supporting the doctrine laid down in Gram *v.* Seton, see Skinner *v.* Dayton, 19 Johns. 513, 5 Johns. Ch. 351; Smith *v.* Kerr, 3 Comst. 144; Cady *v.* Shepherd, 11 Pick. 400; Swan *v.* Stedman, 4 Metc. 548; McNaughten *v.* Partridge, 11 Ohio, 223, 235; Purviance *v.* Sutherland, 2 Ohio St. 478, 486; Person *v.* Carter, 3 Murph. 321; Fleming *v.* Dunbar, 2 Hill (S. C.), 532; Lucas *v.* Sanders, 1 McMullan, 311; McCart *v.* Lewis, 2 B. Mon. 267; Darst *v.* Roth, 4 Wash. C. C. 471; Bond *v* Aitkin, 6 Watts & S. 165, overruling some earlier cases in Pennsylvania; Jackson *v.* Porter, 2 Mart. (La.) 200; Drumright *v.* Philpot, 16 Ga. 424; Price *v.* Alexander, 2 Greene (Ia.), 427; McDonald *v.* Eggleston, 26 Vt. 154; Gwinn *v.* Rooker, 24 Mo. 290; Johns *v.* Battin, 30 Penn. St. 84; Lowery *v.* Drew, 18 Tex. 786. See also Brutton *v.* Burton, 1 Chitty, 707. In Worrall *v.* Munn, 1 Selden, 221, 240, Paige, J., regards the true rule, as derived from the cases, to be, that a prior parol authority, or a subsequent parol ratification, will make a specialty, executed by one partner in behalf of his firm, binding upon his copartners, when the act in question

(*j*) See *ante*, p. * 178, note (*g*).

*182 *partner may bind his firm, and without special authority. (*k*) The reason for the general rule is obvious.

would have been valid if no seal had been used. In Illinois and Alabama, it is held to be a presumption "warranted by common sense, by justice, and sound reason, as well as by the principles of law, that all the signers of an instrument, indicating, upon its face, an intention to seal it, adopt any seal or scrawl that may be annexed to the name of one." Davis *v.* Burton, 3 Scam. 41; Witter *v.* McNiel, id. 433; Hatch *v.* Crawford, 2 Porter, 54; Herbert *v.* Hanrick, 16 Ala. 581. In this last case, the doctrine of Gram *v.* Seton is asserted. In Tennessee, the technical rule of the common law is strictly adhered to, and no partner can bind his copartnership by affixing a seal, unless he be specially empowered, under seal, so to do. Turbeville *v.* Ryan, 1 Humph. 113; Napier *v.* Catron, 2 id. 534. See Lambden *v.* Sharp, 9 id. 224. As for the evidence of prior authority, or subsequent ratification from which a jury may infer the power of one partner to bind his copartners by deed, it has been held, that where, in a deed of dissolution executed by both partners, a debt, for which one partner had given a sealed note in the name of his firm, was put down as a debt "owing by said firm," this was an acknowledgment of the legal obligation upon the firm of the specialty from which an authority to execute it might be inferred. Fleming *v.* Dunbar, 2 Hill (S. C.), 532. So where one of two partners gave a bond for a firm debt, in the name of the firm, and the other partner afterwards gave directions for its payment, by an order in which the bond was described as the bond of the partnership, *held*, that this order was evidence of a recognition of, and an assent to, the act of the partner who executed the bond, from which his authority so to act might fairly be found by the jury. Person *v.* Carter, 3 Murph. 321. See Price *v.* Alexander, 2 Greene (Ia.), 427; Drumright *v.* Philpot, 16 Ga. 424; Bond *v.* Aitkin, 6 Watts & S. 165; Tuttle *v.* Eskridge, 2 Munf. 330; Wilson *v.* Hunter, 14 Wis. 683.

(*k*) The rule applicable to a release by one partner of a joint claim has been generally stated thus: "Though one partner cannot by deed bring any fresh burden upon his copartner, he may bar him of a right which they possess jointly." One reason sometimes given for this apparent exception to the general doctrine of the common law is, that, inasmuch as a debtor may lawfully pay his debt to one partner, he ought, also, to be able to obtain a discharge upon due payment. Another reason, of a similar nature, is suggested by the above rule itself, which is, that though a release be under seal, yet its operation is not, like that of a bond or of a deed, to expose the separate persons and estates (real as well as personal) of the partners to special and dangerous liabilities. But probably the true, though technical, foundation of the rule that one partner may bind his firm by a release, under seal, of a joint claim, is, that inasmuch as such a release is certainly binding on the partner who executes it, and inasmuch as he is a necessary coplaintiff in any action by the firm for the debt released, his release necessarily operates as a bar to any joint action by the partners for the same debt. The rule is the same both in law and in equity. 2 Rol. Abr. 410 (D.); Tooker's Case, 2 Co. 68; Ruddock's Case, 6 id. 25; Perry *v.* Jackson, 4 T. R. 519; Stead *v.* Salt, 10 J. B. Moore, 393, 3 Bing. 103; D. *arguendo*, Swan *v.* Steele, 7 East, 211; per Parke, B., in Adams *v.* Bankart, 1 Cromp., M. & R. 684, and in Phillips *v.* Clagett, 11 M. & W. 84, 94; Pierson *v.* Hooker, 3 Johns. 68; Bulkley *v.* Dayton, 14 id. 387; Morse *v.* Bellows, 7 N. H. 567; United States *v.* Astley, 3 Wash. C. C. 511; McBride *v.* Hagan, 1 Wend. 326, 337; Napier *v.* McLeod, 9 id. 120; Salmon *v.* Davis, 4 Binney, 375; Curtwell *v.* Brown, 5 Jones, 263.

The seal belongs to common law and not to the law-merchant, and partnership belongs to the law-merchant and not to common law. (*l*) But as there are very * few mercantile * 183 transactions in which seals are needed or used: and, if a seal were used when the instrument was equally effective without it, the courts might regard the seal as surplusage only; (*m*) and as a subsequent ratification would have

Respecting deeds of composition, see Watson on Part. p. 225; Ellison *v.* Dezell, 1 Selw. N. P. (Am. ed.) 385. See Hawkshaw *v.* Parkins, 2 Swanst. 539, 544; Bruen *v.* Marquand, 17 Johns. 58; Halsey *v.* Whitney, 4 Mason, 206, 232; Smith *v.* Stone, 4 Gill & J. 310. As one partner may himself release a partnership claim, so he may, under seal, authorize an agent to bind the firm by the discharge of a debt due to it. Wells *v.* Evans, 20 Wend. 251, 22 id. 324. Where one partner duly signed and sealed a release of all actions, claims, demands, &c., but the release did not purport on its face to apply particularly either to the separate demands of that partner or to those of his firm, it not appearing that the releasee was separately indebted to the executing partner, the release was held to be a discharge of the debts due the partnership. Emerson *v.* Knower, 8 Pick. 63. And if one partner execute a deed purporting to release all the joint demands, parol evidence that a particular claim was not intended to be included is inadmissible. Pierson *v.* Hooker, 3 Johns. 68.

(*l*) Lord Kenyon says, in Harrison *v.* Jackson, 7 T. R. 210, that it would be a most alarming doctrine to hold out to the mercantile world that one partner could bind the others by deed; since it would extend to the case of mortgages, and would enable a partner to give to a favorite creditor a real lien on the estates of the other partners. But the reasoning of Jones, C. J., on this point, in Gram *v.* Seton, 1 Hall, 269, seems conclusive: "Negotiable paper, by which the partner may bind the firm, equally imports a consideration with a seal; and, upon general principles, the use of the seal of the copartner, equally with the signature of the copartnership, would, if permitted, be restricted to copartnership purposes and copartnership operations solely; and the joint deed of the copartners executed by the present for the absent members, be held competent to convey or to encumber the copartnership property alone, and to have no operation upon the private funds or separate estate of the copartners. With these restrictions upon the use and operation of the seal, is not the power of a partner to bind his copartner, and to charge and encumber his estate, as great and as mischievous, without the authority to use the seal of the absent partner, as it would be with that authority?" It is to be remembered, also, that the distinction formerly taken between debts by specialty and those by simple contract — by which the former were held to be a charge upon the real estate of the debtor, while the latter were not — is now for the most part done away, at least in this country.

(*m*) This doctrine has been oftenest applied where one partner has transferred an interest, absolute or qualified, in the partnership property. Thus, a general or partial assignment for the benefit of creditors, Anderson *v.* Tompkins, 1 Brock. 462; Harrison *v.* Sterry, 5 Cranch, 289; M'Cullough *v.* Sommerville, 8 Leigh, 415; Robinson *v.* Crowder, 4 McCord, 519; Deckard *v.* Case, 5 Watts, 22; Hennessy *v.* Western Bank, 6 Watts & S. 300, 310; a mortgage of personal property belonging to the firm, Tapley *v.* Butterfield, 1 Metc. 515; Milton *v.* Mosher, 7 id. 244; Sweetzer *v.* Mead, 5 Mich.

*184 the *effect of previous authority; and as courts of equity, and, to some extent, courts of law, place land, when it is part of the partnership property (and it is in relation to conveyances of land that the seal is most necessary, and most frequently interferes with the law of partnership), on the

107; an assignment of a chose in action due to the firm, Everit *v.* Strong, 5 Hill, 163: these transactions have all been held valid, notwithstanding that the partner, purporting to act for his firm, has used a seal therein. It has also been *held*, that a delegation of power under seal by one partner to do acts which the agent would have been equally competent to do, if authorized by parol, was not invalid on account of the unnecessary solemnity of the instrument making the delegation. Lucas *v.* Bank of Darien, 2 Stewart, 280. See also Price *v.* Alexander, 2 Greene (Ia.), 427, 433; Purviance *v.* Sutherland, 2 Ohio St. 478; and *contra*, Cummins *v.* Cassily, 5 B. Mon. 74, 75. Upon the same principle, the case of Brutton *v.* Burton, 1 Chitty, 707, seems to have been decided. The doctrine has even been extended to executory contracts. Lawrence *v.* Taylor, 5 Hill, 107; Worrall *v.* Munn, 1 Selden, 229. See Pike *v.* Bacon, 21 Me. 280; McWhorter *v.* McMahon, 1 Clarke Ch. 400; Ruffner *v.* McConnel, 17 Ill. 212, 216. See remarks of Rogers, J., in Hennessy *v.* Western Bank, 6 Watts & S. 310. The limitation to the doctrine, that a transaction by one partner which would be binding on the firm without seal is not vitiated because a seal is used, is thus stated in Lucas *v.* Bank of Darien, 2 Stew. 297: "It is said that even an act which would be valid against the firm without a seal, if done by the partner or by agent under a parol appointment, would be void if executed by specialty. On this point I think a wise discrimination is required. I take the distinction to be this: that, if the bond or deed constitutes the contract, it must be made the evidence of it, and determines the remedy. Then the principle applies; because the legal effect of the contract, the form of the remedy, and the rules of evidence, are essentially different, the security being of higher dignity." And this is in accordance with the language of Marshall, C. J., in Anderson *v.* Tompkins, 1 Brock. 462: "No action can be sustained against the partner who has not executed the instrument on the deed of his copartner. No action can be sustained against the partner, which rests on the validity of such a deed as to the person who has not executed it." Bewley *v.* Tams, 17 Penn. St. 485. The doctrine of the court in Purviance *v.* Sutherland, 2 Ohio St. 478, is, that the technical rule of the common law is satisfied by holding that an agreement under seal in the name of the firm, which is executed by one partner only, is not *the* DEED *of the partnership*. But such an agreement, though the deed only of the partner sealing it, may yet be evidence of a partnership liability (Fagely *v.* Bellas, 17 Penn. St. 67); and perhaps the form of the agreement may raise a presumption that a seal was affixed to the contract by mistake. In Kentucky, by statute, promissory notes have all the legal effect and dignity of bonds under seal. Nevertheless, "if a partner, in executing several notes for a debt, in instalments, should happen to affix a superfluous scrawl to one of them, and omit it as to the others, the first might be binding on himself alone, whilst the others would bind all the partners; and *this* would be the only legal effect of the scrawl, without which the note would have the same effect in every other respect." Per Robertson, C. J., in Montgomery *v.* Boone, 2 B. Mon. 244. See Human *v.* Cuniffe, 32 Mo. 316; Dubois's Appeal, 38 Penn. 231. But see Schmertz *v.* Shreeves, 62 Penn. St. 457, and Russell *v.* Annable, 100 Mass. 72.

same footing with personal property, — the rule that a partner can affix no seal but his own and that of one who has given him authority to do so, may perhaps be considered as having now less practical importance than formerly.

5. *Of the Representations or Admissions of a Partner.*

As a partner may act for his firm by his general authority, so, as we have already seen, his representations, acknowledgments, admissions, part payments, notice given or received, and all other doings on which rights or obligations may be founded, are binding upon the partnership: always, however, with the qualification that these things belong fairly and actually to the business of the firm; for this is a condition which universally limits his power. Thus, it was once quite uncertain what was the effect of an acknowledgment, by a partner, of a debt barred by the statute of limitations. It was held to bind the firm as long as this statute was regarded as founded on presumption of payment. Whether there had been such payment was perfectly well known to every partner, and known to each one after a dissolution as well as before. Consequently, if a partnership owed a debt, and was dissolved, and the debt ran on more than six years, and then one of the former partners acknowledged the debt, this removed the presumption of payment, and all the partners became bound. (*n*) *But when the *185

(*n*) The different views taken at different periods by the courts of the statute of limitations are stated in all the elementary treatises upon the subject. See 3 Parsons on Contracts, 61, 67; Angell on Limitations, ch. 20 and 23. The earliest decisions of all seem to indicate that the statute was at first regarded as a statute of repose. But this view soon gave way to another, which construed the statute as one of presumption entirely; rendering it probable that the barred debt had been paid, but leaving this presumption liable to rebuttal by any thing amounting to proof that the debt was in fact unsatisfied. It is true, that, to recover upon a claim against which the statute had run, there was required not only satisfactory evidence of the existence of the debt, but also a new promise. But if the continued existence of the debt was proved by the acknowledgment or admission of the debtor, or by any thing amounting thereto, then the plaintiff was not required to go further, but might rest his case upon proof of the acknowledgment or admission, and the law would imply therefrom the necessary promise. While the statute of limitations was regarded in this light, the effect of an acknowledgment by one of several joint debtors, that a joint debt barred by the statute was still unsatisfied, came before Lord Mansfield, in the case of Whitcomb *v.* Whiting, 3 Doug. 652. There the declaration, in the common form, was upon a

statute of limitation came to be looked upon, as it now is universally, as a statute of repose and not of presumption,

joint and several promissory note; pleas, the general issue, and non-assumpsit *infra sex annos;* replication, assumpsit *infra sex annos.* At the trial, the plaintiff produced a joint and several note executed by the defendant and three others; and having proved payment, by one of the others, of interest on the note, and part of the principal within six years, and the judge thinking that was sufficient to take the case out of the statute as against the defendant, a verdict was found for the plaintiff. A rule being granted to show cause why there should not be a new trial, it was contended that the plaintiff, by suing the defendant separately, had treated this note exactly as if it had been signed only by the defendant; and, therefore, whatever might have been the case in a joint action, in this case the acts of the other parties were clearly not evidence against him. The acknowledgment of a party himself does not amount to a new promise, but is only evidence of a promise. Lord Mansfield: "The question here is only whether the action is barred by the statute of limitations. Payment by one is payment for all, the one acting, virtually, as agent for the rest: and, in the same manner, an admission by one is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due." Willes, J.: "The defendant has had the advantage of the partial payment, and therefore must be bound by it." Ashhurst and Buller, JJ., of the same opinion.

In the first place, it is to be observed of this case that it proceeds upon the then prevailing idea, that the statute of limitations was to be regarded as one of presumption. Per Best, C. J., in Perham *v.* Raynal, 2 Bing. 306; Richardson, C. J., in Exeter Bank *v.* Sullivan, 6 N. H. 124. In the second place, it decides that joint debtors are, from their community of interest, so far agents of each other that any one of them can bind the rest by an admission respecting the joint debt, even though that debt be barred by the statute of limitations. It does not decide that one of several joint debtors can, under such circumstances, bind his co-debtors by a fresh promise, or by making them liable upon a new and independent cause of action. It only declares that the acknowledgment of one must be taken as the acknowledgment of all; then, all having admitted their joint indebtedness, the law raises the new promise.

As to the support which the case derives from other adjudications, it has sometimes been supposed to be inconsistent with the earlier case of Bland *v.* Haselrig, 2 Vent. 152. See Atkins *v.* Tredgold, 2 B. & C. 28, opinion of Abbott, C. J. But, besides the facts that the latter case cannot be regarded as of much authority, and can best be explained in a manner which leaves it in no way contradictory (see note in 3 Doug. 653; remarks of Best, C. J., in Perham *v.* Raynal, 2 Bing. 309; of Parker, C. J., in White *v.* Hall, 3 Pick. 293; of Story, J., in Bell *v.* Morrison, 1 Pet. 367), Whitcomb *v.* Whiting has been constantly acted upon as sound law in the English courts; not always, however, we think, upon precisely the same grounds. So long as the statute of limitations was regarded as one of presumption merely, Whitcomb *v.* Whiting might be, as it was, literally followed. Its doctrine was pushed to its utmost limits in Jackson *v.* Fairbank, 2 H. Bl. 340. There, one of two makers of a joint and several promissory note having become bankrupt, the payee received a dividend under the commission, on account of the note, within six years before action brought. It was *held,* that the payment of such dividend was such an acknowledgment of the debt as took the case out of the statute of limitations as to the other maker. This last

* and as resting on the principle that the courts should not *186 enforce an unpaid debt, if it were old and stale, then the

case, and the whole doctrine of Whitcomb *v.* Whiting, were, it is true, strongly questioned in Brandrum *v.* Wharton, 1 B. & Ald. 463. So also in Atkins *v.* Tredgold, 2 B. & C. 23, where, one of two makers of a joint and several promissory note having died, it was *held*, that the payment of interest within six years by the other maker would not take the case out of the statute, as against the executors of the deceased promisor. But in Perham *v.* Raynal, 2 Bing. 306, where the two cases just mentioned are considered, Whitcomb *v.* Whiting was explicitly denied to be in any way impugned by them, and was expressly affirmed as good law. Best, C. J., thus concluded his opinion: "It seems, therefore, that the decision in Whitcomb *v.* Whiting rests on the same principle as decisions with respect to admissions by one of several persons jointly concerned in other instances; that we should create an anomaly by departing from it; that it has been confirmed in many cases, and not shaken by any authority." See Halliday *v.* Ward, 3 Camp. 32.

The cases we have just been considering were all adjudged while the statute of limitations was still regarded as a statute of presumption, Perham *v.* Raynal being decided in 1824. In little more than a year after, Court *v.* Cross, 3 Bing. 329, was adjudged in the Common Pleas, and was the first case in which a decided step was taken towards construing the statute of limitations as a statute of repose. C. J., Best, who then delivered the opinion of the court, reasserted this view of the statute in Scales *v.* Jacob, 3 Bing. 652. The position he assumed was adopted and confirmed by Lord Chief Justice Tenterden, in Turner *v.* Smart, 6 B. & C. 603; and thenceforward the statute of limitations has been invariably regarded and construed as a statute of repose. The earlier doctrine was also applied to payments of interest, made by one of the makers of a joint and several promissory note, though more than six years after it became due. They were held to take the case out of the statute, as against the other maker. Manderston *v.* Robertson, 4 Man. & Ry. 440; Channell *v.* Ditchburn, 5 M. & W. 494. But, in such case, the payment or payments must be distinctly shown to be made on account of the particular debt. Holme *v.* Green, 1 Stark. 488. So, where A. and B. made a joint and several promissory note, B. being merely a surety, a part payment by A., within six years and during the lifetime of B., was held to take the case out of the statute so as to make B.'s administrator liable on the note. Burleigh *v.* Stott, 8 B. & C. 36. See Perham *v.* Raynal, 2 Bing. 306; Wyatt *v.* Hodson, 8 id. 309. And where one of three joint contractors, more than six years after the contracting of the original debt, but within six years of the action brought, made a payment on account of a joint debt, but in fraud of his co-contractors, it was nevertheless held to bar the operation of the statute as against the other two. Goddard *v.* Ingram, 3 Q. B. 839. See Martin *v.* Brydges, 3 Car. & P. 83. But, as we have already seen, payment of interest by one or two makers of a joint and several promissory note, after the death of the other, will not take the case out of the statute, as against the executor of the deceased maker. Atkins *v.* Tredgold, *supra*. See Ault *v.* Goodrich, 4 Russ. 430; Way *v.* Bassett, 5 Hare, 55; the principle being that the joint contract is determined by the death of one of the joint contractors; nor after the death of one of two joint contractors will a payment on joint account by the executor of the deceased take a debt out of the statute, as against the survivor. Slater *v.* Lawson, 1 B. & Adol. 396. See Giffin *v.* Ashby, 2 C. & K. 139. See further, in confirmation of the general principle, Rew *v.* Pettet, 1 A. &

* 187 bar of the statute * could only be removed by a new promise; that is, the old debt could not itself be demanded, but

El. 196; Pease *v.* Hirst, 10 B. & C. 122; Clark *v.* Hooper, 10 Bing. 480; Pritchard *v.* Draper, 1 Russ. & Myl. 191.

Respecting acknowledgments or promises by words only, the question is put at rest in England by Lord Tenterden's act (9 Geo. 4, ch. 14), which, after reciting 21 Jac. 1, ch. 16, and the Irish act of 10 Car. 1, sess. 21, ch. 26, declares "that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefits of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them." But, with respect to admissions by payments, the same statute provides "that nothing therein contained shall alter, take away, or lessen the effect of any payment of any principal or interest by any persons whatsoever." The effect of this proviso is, to leave the effect of past payment of principal or interest, by one of several joint debtors, the same as before the passage of the statute; and the reason for it is said by Chief Justice Tindal, in Wyatt *v.* Hodson, 8 Bing. 312, to be, "Because the payment of principal or interest stands on a different footing from the making of promises, which are often rash or ill interpreted; while money is not usually paid without deliberation, and payment is an unequivocal act, so little liable to misconstruction as not to be open to the objection of an ordinary acknowledgment." Chippendale *v.* Thurston, 4 C. & P. 98; 1 Moody & M. 411; Waters *v.* Tompkins, 2 C., M. & R. 723.

The principle, then, being established in the English law, that an acknowledgment by one of several joint debtors of the existence of a joint debt will operate as a new promise by all to pay, which principle is, however, by statute limited in its application to acknowledgments by past payments, we may next inquire what is the effect in the English law of a payment by one of several partners of principal or interest on account of a partnership debt, after the firm has been dissolved. That is, Whitcomb *v.* Whiting, as now construed, deciding that one of several joint contractors has an implied power, resulting from their community of interest, to bind all by a promise to pay a debt barred by the statute of limitations, the precise question with respect to partners is, How long does this community of interest, from which this implied power is derived, continue? Does it exist after the dissolution of the firm, so that one partner may *then* still charge his copartners by a promise to pay a debt against which the statute has run? It seems to be settled in England that it does so exist; and that one partner may, after dissolution, impose a fresh charge upon his copartners, by a payment of principal or of interest, on account of an unliquidated partnership debt barred by the statute of limitations. Two reasons seem to be given for this doctrine. In the first place, partners after dissolution, being still jointly liable for the partnership debts, are still regarded as joint debtors, and therefore within the rule of Whitcomb *v.* Whiting. Furthermore, it was decided in Wood *v.* Braddick, 1 Tannt. 104, that an admission by one of two partners, after the dissolution of the partnership, concerning joint contracts made during the partnership, is competent evidence to charge the other partner. In Pritchard *v.* Draper, 1 Russ. & Myl. 191, 199, Lord Chancellor Brougham asserted the same doctrine; and it being objected that the declarations of one partner after dissolution as to a fact relating to partnership transactions, but which fact also took place after dissolution, were not admissible evidence against the other partner, he said: "The partnership, it is true, had ceased; but so, in Whitcomb

it was a good consideration *for a new promise; and, *188
if this were made, it could be enforced. But the ques-

v. Whiting, had the connection between the two makers of the promissory note. And in Goddard *v.* Ingram, 3 Q. B. 839, where one of several partners, after the dissolution of his firm and more than six years after the incurring of the original debt, but within six years of the bringing of the action, had made a part payment on account of it, which the jury found to be fraudulent upon his copartners, it was *held*, nevertheless, that the payment barred the operation of the statute."

Such seems to be the state of the English law upon this subject. With respect to the law of this country, as we have before said, it seems to be settled, generally, and perhaps universally, that the statute of limitations is one of repose, and not one of presumption. Whitcomb *v.* Whiting, as above explained in connection with the statute of limitations, has also been followed in many authoritative cases, and its principle applied to all kinds of acknowledgments and admissions, except where in England its operation has been restricted by express enactment. Thus in the New England States, with the exception of New Hampshire, the doctrine of that case has been uniformly approved. Getchell *v.* Heald, 7 Greenl. 26; Pike *v.* Warren, 15 Me. 390; Dinsmore *v.* Dinsmore, 21 id. 433; Shepley *v.* Waterhouse, 22 id. 497; Martin *v.* Root, 17 Mass. 227; Cambridge *v.* Hobart, 10 Pick. 232; Ilsley *v.* Jewett, 2 Metc. 168; Wheelock *v.* Doolittle, 18 Vt. 440; Joslyn *v.* Smith, 13 id. 353; Turner *v.* Ross, 1 R. I. 88; Bound *v.* Lathrop, 4 Conn. 336; Coit *v.* Tracy, 9 id. 1. So also in Virginia, Shelton *v.* Cocke, 3 Munf. 191 (see Farmers' Bank *v.* Clarke, 4 Leigh, 603); in South Carolina, in the early cases, Beitz *v.* Fuller, 1 McCord, 541; Fisher *v.* Tucker, 1 McCord, Ch. 169; which are, however, now overruled (see next note); in North Carolina, Davis *v.* Coleman, 7 Ired. 424; in Pennsylvania, Zent *v.* Heart, 8 Barr, 337, overruling prior case; in New York, in some of the early decisions, which, however, have since been overruled, see Smith *v.* Ludlow, 6 Johns. 257; Johnson *v.* Beardslee, 15 id. 3, and next note. The rule of Whitcomb *v.* Whiting, as in England, has also been frequently applied in this country to the case of a joint and several promissory note, made by two or more parties, but by some of them only in the character of surety. Hunt *v.* Bridgham, 2 Pick. 581; Sigourney *v.* Drury, 14 id. 387; Shepley *v.* Waterhouse, 22 Me. 497; Joslyn *v.* Smith, 13 Vt. 356; Clark *v.* Sigourney, 17 Conn. 511; Caldwell *v.* Sigourney, 19 id. 37; Zent *v.* Heart, 8 Barr, 337. And in Fisher *v.* Tucker, 1 McCord Ch. 169, and Hathaway *v.* Haskell, 9 Pick. 42, it is *held*, in accordance with Atkins *v.* Tredgold, and Brandrum *v.* Wharton, *supra*, that, one of two joint debtors dying, neither the survivor nor the representatives of the deceased can, as against each other, by their acknowledgments, part payment &c., take the debt out of the statute. See also Roosevelt *v.* Mark, 6 Johns. Ch. 266, 291, 292. Partners, after dissolution, being jointly liable for the partnership debts, may still be regarded, therefore, as joint contractors. On this ground alone, in those courts where Whitcomb *v.* Whiting is followed, the principle upon which it proceeds might be expected to be, and is generally, applied to them. But, in some of the cases upon this point, the doctrine laid down in Wood *v.* Braddick, 1 Taunt. 104, is also asserted; and partners of a firm which has been dissolved are held to have the power of charging each other by acknowledgments of debts barred by the statute of limitations, on the ground that, as to all past partnership transactions, the partnership, and, of course, with it, the power of each partner, still continues. The general doctrine of Wood *v.* Braddick we shall

* 189 tion then is, Who makes it? And this * will depend upon whether the partnership is still in existence, or has

consider hereafter. Here it is sufficient to remark, that it seems to be applicable to the case of a debt barred by the statute of limitations, only on the supposition that the statute is to be construed as one of presumption merely, and that the original debt still constitutes a valid claim when once proved; a supposition, as we have seen, wholly inconsistent with the modern authorities. As cases illustrative of the above remarks, see Greenleaf *v.* Quincy, 3 Fairf. 11; Dinsmore *v.* Dinsmore, 21 Me. 436, 439; Austin *v.* Bostwick, 9 Conn. 496; Smith *v.* Ludlow, 6 Johns. 267; Patterson *v.* Choate, 7 Wend. 441; Hopkins *v.* Banks, 7 Cow. 650; White *v.* Hall, 3 Pick. 291; Cady *v.* Shepherd, 11 id. 400, 407; Vinal *v.* Burrill, 16 id. 401; Wheelock *v.* Doolittle, 18 Vt. 440; Brockenbrough *v.* Hackley, 6 Call, 51; Shelton *v.* Cocke, 3 Munf. 191; Simpson *v.* Geddes, 2 Bay, 533; Kendrick *v.* Campbell, 1 Bailey, 522; Fisher *v.* Tucker, 1 McCord Ch. 190; McIntire *v.* Oliver, 2 Hawks, 209; Walton *v.* Robinson, 5 Ired. 341; Ward *v.* Howell, 5 Harris & J. 60. But though the rule of Whitcomb *v.* Whiting, and, in connection with it, that of Wood *v.* Braddick, have, to so great an extent, been adopted in this country, they have, also, now generally received important qualifications. One of these is, that before the acknowledgment of a partner, as to a debt, can be received, to charge his copartners, the existence of the original joint debt must be proved *aliunde*. The acknowledgment of one partner alone, after dissolution, is not competent both to prove the original joint indebtedness and to take the debt out of the statute as against all his copartners. Smith *v.* Ludlow, Patterson *v.* Choate, Shelton *v.* Cocke, Fisher *v.* Tucker, Ward *v.* Howell, Cady *v.* Shepherd, Vinal *v.* Burrill, Greenleaf *v.* Quincy, *supra;* Hackley *v.* Patrick, 3 Johns. 536; Owings *v.* Low, 5 Gill & J. 134, 144; Willis *v.* Hill, 2 Dev. & Bat. 231; Lachourette *v.* Thomas, 5 Rob. (La.) 172; Meggett *v.* Finney, 4 Strobh. 220; Walker *v.* Duberry, 1 A. K. Marsh. 189.

For a criticism, by Judge Story, upon this qualification of the original rule, see Bell *v.* Morrison, 1 Pet. 372. It is also held in many instances, that though the admission of one joint debtor, as partner, after dissolution, is competent evidence by which to fix all with a promise to pay the barred debt, yet it is not conclusive. Joslyn *v.* Smith, 13 Vt. 358; Fisher *v.* Tucker, 1 McCord Ch. 190; Cady *v.* Shepherd, 11 Pick. 408; Vinal *v.* Burrill, 16 id. 406; Austin *v.* Bostwick, 9 Conn. 496. And if an acknowledgment of a joint debt by one partner, after dissolution, appears to be collusively made with a view to promote that partner's interests in some way, evidence of an acknowledgment made under such circumstances is not *sufficient* to remove the bar of the statute as against all the partners. Coit *v.* Tracy, 8 Conn. 268.

It is to be added that, in a number of the States (and the number is increasing), statutes similar to 9 Geo. 4, ch. 14, have rendered the acknowledgment of one joint contractor insufficient to take any case out of the statute of limitations as to his cocontractors. Generally, as in the English statute, though not uniformly, an exception is made of an acknowledgment by part payment. See Mass. Gen. Stat. ch. 155, § 14; Williams *v.* Gridley, 9 Metc. 482; Maine Rev. Stat. ch. 146, § 27; Sibley *v.* Lambert, 30 Me. 253; Vt. Gen. St. ch. 63, §§ 23, 28; Carlton *v.* Ludlow Woollen Mill, 1 Williams, 496; Caldwell *v.* Lawrence, 20 Ga. 94; Foute *v.* Bacon, 24 Miss. 156; Briscoe *v.* Anketell, 28 id. 361; Webster *v.* Stearns, 44 N. H. 498; Griswold *v.* Haven, 25 N. Y. 595. A debt may become barred, by the statute of limitations, as to one mem-

been dissolved. If it still exists, the partner making the
* promise has a right to make it for his copartners and * 190
himself, and it is then the promise of the whole partnership. But, if the partnership be dissolved, his authority has wholly gone, and the new promise which he makes is his own only. The cases are very numerous in which these questions are raised; and we endeavor to exhibit in our notes the principal authorities. It will be seen that in these cases, not only the general question of the authority of the partner is considered, but the particular questions which occur when the new promise is made, if at all, not only by an acknowledgment, but, in the absence of this, by part payment of the principal or of the interest. (*o*)

ber of a partnership in the State, and not as to those out of the State. Spaulding *v.* Ludlow Woollen Mill, 36 Vt. 150.

(*o*) See Bell *v.* Morrison, 1 Pet. 351, 371. See also Exeter Bank *v.* Sullivan, 6 N. H. 124, where the same question was raised. Story, J., in the former case, *held*, that an acknowledgment by one partner, after the dissolution of the partnership, was not sufficient to take the case out of the statute of limitations as to the other partners. The doctrine of that case has been adopted and applied in other cases, in New Hampshire, New York, Pennsylvania, South Carolina, Indiana, Georgia, Tennessee, and Alabama. Kelley *v.* Sanborn, 9 N. H. 46; Mann *v.* Locke, 11 id. 249; Whipple *v.* Stevens, 2 Foster, 219; Tappan *v.* Kimball, 10 id. 136; Van Keuren *v.* Parmelee, 2 Comst. 523; Shoemaker *v.* Benedict, 1 Kern. 176; Searight *v.* Craighead, 1 Barr, 135; Levy *v.* Cadet, 17 S. & R. 126; Steele *v.* Jennings, 1 McMullan, 297; Gowdy *v.* Gillam, 6 Rich. 29; Lefavour *v.* Yandes, 2 Blackf. 240; Yandes *v.* Lefavour, id. 371; Kirk *v.* Hiatt, 2 Cart. (Ind.) 322; Brewster *v.* Hardeman, Dudley (Ga.), 138; Belote *v.* Wynne, 7 Yerger, 534; Muse *v.* Donelson, 2 Humph. 166; Wilson *v.* Torbet, 3 Stew. 296. See, further, Bispham *v.* Patterson, 2 McLean, 87; Clementson *v.* Williams, 8 Cranch, 72; Zent *v.* Heart, 8 Barr, 337; Lowther *v.* Chappell, 8 Ala. 353; Whitney *v.* Reese, 11 Minn. 138; [Mayberry *v.* Willoughby, Sup. Ct. Neb., 3 L. & Eq. Reptr. 380.] In quite a number of cases, a distinction is taken between acknowledgments made before and those made after a debt has been barred by the statute; the former, when made by a joint contractor or a partner, after dissolution, being sometimes thought, as against the cocontractors, to have the effect of arresting the progress of the statute, and of fixing a new point from which the original joint debt should begin to run. See Scales *v.* Jacob, 3 Bing. 638; Gardner *v.* McMahon, 3 Q. B. 561, 566; Brewster *v.* Hardeman, Dudley (Ga.), 138, 150; Tillinghast *v.* Nourse, 14 Ga. 641; Fisher *v.* Tucker, 1 McCord Ch. 169, 172; Meggett *v.* Finney, 4 Strobh. 220; Sigourney *v.* Drury, 14 Pick. 387, 391; Ellicott *v.* Nichols, 7 Gill, 85; Dunham *v.* Dodge, 10 Barb. 566; Reid *v.* McNaughton, 15 id. 168. See also Wheelock *v.* Doolittle, 18 Vt. 440. The later, if not better, opinion seems to be, however, that there is no distinction, in effect, between acknowledgments made before and those made after the statute has ceased to run. See the opinion of the court in Shoemaker *v.* Benedict, 1 Kern. 176, 186. See Reppert *v.* Colvin, 48 Penn. 248.

*191 *A similar principle determines all the questions raised by the acts of one partner. If the partnership has ceased, his authority has gone, unless he derives it from his power to settle the estate as surviving partner, or in some other especial manner. That is, he can no longer make a new promise, which shall be their promise as well as his. But it does not follow that his admissions and acknowledgments, as those of one well acquainted with the facts, especially if they are against his interest, should not be received as determining a question, not of future promise, but of a past fact. We cannot but think, however, that the true principle which should decide this much-vexed question, must be this: After a dissolution, however caused, the new words and acts of those who were partners shall have no effect upon the rights or obligations of their former copartners, excepting so far as these words and acts fairly belong to the settlement of the concern, and the power which each partner has in winding it up. (*p*) If

(*p*) There are many conflicting opinions upon the point whether the admissions, acknowledgments, &c., of one partner after dissolution, respecting partnership transactions which occurred during the continuance of the firm, are competent evidence upon which to charge the other partners. Whether one partner can after dissolution make this new contract for his firm is different from the questions as to the statute of limitation, which we have already considered. Is that which a partner does or says after the dissolution of the firm, respecting the past joint concerns, admissible evidence to affect the partnership? The general view taken of the question is this: Partners after dissolution, being still jointly liable for the partnership debts as well as jointly entitled to the partnership credits, may therefore be regarded as holding the relations and possessing the rights of all joint contractors. But by the *dicta* of Lord Mansfield in Whitcomb *v.* Whiting, Doug. 652, which have always been greatly deferred to, "payment by one of several joint contractors is payment for all, the one acting, virtually, as agent for the rest; and, in the same manner, an admission by one is an admission by all." Hence has resulted the doctrine, that when a partnership is dissolved, the dissolution takes effect only as to things future, not as to things past; and that, respecting the latter, each partner may charge his copartners by his acts or declarations, though such evidence is not conclusive. The leading case is Wood *v.* Braddick, 1 Taunt. 104. This was an action brought to recover from the defendant the proceeds of certain linens, which the bankrupts, in the year 1796, had consigned for sale in America, as the plaintiffs alleged, to the defendant jointly with one Cox, who was then his partner, but, as the defendant contended, to Cox only. The defendant pleaded the general issue, and the statute of limitations. At the trial at Guildhall, before Mansfield, C. J., the plaintiffs produced in evidence a letter from Cox, dated the 24th of June, 1804, stating a balance of 919*l.* to be then due to the bankrupts upon this consignment. It was in proof that on the 30th of July, 1802, Braddick & Cox dissolved their partnership, as from the 17th of November, 1800. Cockell & Lens, Sergeants, objected, that this

the * partnership exists, the question then is, Do the act * 192
or the words refer to the * business of the partnership? * 193

letter being written after the dissolution of the partnership, was not admissible evidence to charge Braddick. The Chief Justice overruled the objection, but reserved the point; and the jury, being of opinion that the agency was undertaken by Cox on the partnership account, found a verdict for the plaintiff. Mansfield, C. J.: "Clearly the admission of one partner, made after the partnership has ceased, is not evidence to charge the other, in any transaction which has occurred since their separation; but the power of partners, with respect to rights created pending the partnership, remains after the dissolution. Since it is clear that one partner can bind the other during all the partnership, upon what principle is it, that, from the moment when it is dissolved, his account of their joint contracts should cease to be evidence; and that those who are to-day as one person in interest should to-morrow become entirely distinct in interest with regard to past transactions which occurred while they were so united?"

Heath, J.: "Is it not a very clear proposition, that when a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future? With regard to things past, the partnership continues, and always must continue."

The principle of Wood *v.* Braddick is affirmed in Pritchard *v.* Draper, 1 Russ. & M. 191, where it was *held*, that the declaration of one of two partners, that, subsequently to dissolution, a debt due to the partnership had been paid, was admissible as evidence against the other partner. See Goddard *v.* Ingram, 3 Q. B. 839; Lacy *v.* M'Neile, 4 Dow. & R. 7, 9. See also Parker *v.* Morrell, 2 C. & K. 599, where it was *held*, that the answer in chancery of one who had been a partner in a firm, but who had retired from the firm and ceased to have any interest in it before the commencement of the suit, is not admissible in evidence against the continuing partners of the firm, although it relates to transactions which occurred with the firm at the time when the retired partner was a member of it. The doctrine of Wood *v.* Braddick is maintained in many American cases. Thus the acknowledgment of one partner, after dissolution, as to the balance of an account, has been held to be competent evidence against all the partners. Vinal *v.* Burrill, 16 Pick. 401; Bridge *v.* Gray, 14 id. 55; Simpson *v.* Geddes, 2 Bay, 533; Garland *v.* Agee, 7 Leigh, 362. See Woodworth *v.* Downer, 13 Vt. 522. See further, as to the general doctrine, Cady *v.* Shepherd, 11 Pick. 407; Austin *v.* Bostwick, 9 Conn. 496; Kendrick *v.* Campbell, 1 Bailey, 522; Gay *v.* Bowen, 8 Metc. 100; Fisher *v.* Tucker, 1 McCord Ch. 190; Brewster *v.* Hardeman, Dudley (Ga.), 140; Greenleaf *v.* Quincy, 3 Fairf. 11; Mann *v.* Locke, 11 N. H. 246; Parker *v.* Merrill, 6 Greenl. 41; Ide *v.* Ingraham, 5 Gray, 106; Darling *v.* March, 22 Me. 184; Reimsdyk *v.* Kane, 1 Gallis. 635, 636. The qualification which is generally, if not universally, put upon the rule, that the joint contract must first be proved by evidence *aliunde* the admission of the single partner, we have already considered.

In opposition to this view of the power of one partner after dissolution, it is *held* by weighty authorities in this country, that, when a partnership ceases to exist, the power of each partner wholly ceases also; so that, unless he have special authority, his acts, declarations, &c., even when they relate to past partnership transactions, are utterly inadmissible as against his firm. Judge Story, who takes this view, says it seems difficult upon principle to perceive how the acts, declarations, &c., of one partner after dissolution can be binding upon his partnership "any more than the declarations, or acts, or acknowledgments of any other

* 194 If so, it binds the firm. (*q*) Thus, * an admission, by one partner (the partnership or joint liability having

agent of the partnership would be, after his agency had ceased. In the latter case, they are constantly *held* inadmissible by the courts of common law, upon grounds which seem absolutely irresistible." Story on Part. § 323. In New York, Wood *v.* Braddick is definitively overruled, and the law settled in accordance with the principles we have just stated. In Van Keuren *v.* Parmelee, 2 Comst. 530, Bronson, J., said: "Although the rule is different in England in relation to admissions concerning partnership transactions (Wood *v.* Braddick, 1 Taunt. 104), it has been settled by a series of adjudications in this State, that the authority of partners to bind each other by any undertaking or admission, even though it relate to partnership transactions, ceases with the partnership. In Hackley *v.* Patrick (3 Johns. 536), although it was mentioned in the notice of dissolution, that Hastie, one of the partners, would adjust the unsettled business of the partnership, it was *held*, that his subsequent admission of a balance due from the firm to the plaintiffs, on account, would not bind his copartner. The court said it was 'a clear case. After the dissolution of a copartnership, the power of one party to bind the others wholly ceases. There is no reason why his acknowledgment of an account should bind his copartners, any more than his giving a promissory note in the name of the firm, or any other act.' This doctrine was reasserted and applied in Sandford *v.* Mickles (4 Johns. 224), where it was *held*, that a partner to whom authority had been given on the dissolution to collect and pay debts, could not indorse a promissory note belonging to the firm so as to pass the title to the indorsee. See Yale *v.* Eames (1 Metc. 486). In Walden *v.* Sherburne (15 Johns. 409), it was again decided that the admission by one of the partners, after a dissolution, of a balance against the firm, did not bind the other partner. And where the notice of dissolution stated that the business would be settled by one of the partners, who was duly authorized to sign the name of the firm for that purpose, it was *held*, that such partner could not renew a note previously given by the firm, and which was running in the bank at the time of the dissolution. National Bank *v.* Norton, 1 Hill, 572. Mitchell *v.* Ostrom, 2 Hill, 520, asserts the same general doctrine. And in Baker *v.* Stackpoole, 9 Cowen, 420, the rule, that one partner, after a dissolution, cannot bind his fellows by an admission relating to partnership transactions, was sanctioned by the unanimous judgment of the Court for the Correction of Errors." Mercer *v.* Toler, Anth. N. P. 119; Gleason *v.* Clark, 9 Cow. 57; Hopkins *v.* Banks, 7 id. 650; Brisban *v.* Boyd, 4 Paige, 17; Bank of Vergennes *v.* Cameron, 7 Barb. 143. See also, upon the same point, Bell *v.* Morrison, 1 Pet. 351; Rootes *v.* Walford, 4 Munf. 215; Chardon *v.* Oliphant, 3 Brev. 183; Walker *v.* Duberry, 1 A. K. Marsh. 189; Craig *v.* Alvesson, 6 J. J. Marsh. 614; Barringer *v.* Sneed, 3 Stew. 201; Demott *v.* Swaim, 3 Stew. & P. 293; Beckham *v.* Pray, 2 Bailey, 133; Atwood *v.* Gillett, 2 Doug. (Mich.) 206; Pope *v.* Risley, 23 Mo. 185; Miller *v.* Neimerick, 19 Ill. 172; Lefavour *v.* Yandes, 2 Blackf. 240, 371; Kirk *v.* Hiatt, 2 Cart. (Ind.) 322; Brady *v.* Hill, 1 Miss. 315; Owings *v.* Low, 5

(*q*) Thus Abbott, C. J., In Sandilands *v.* Marsh, 2 B. & Ald. 678: "But the true construction of the rule is this, that the act and assurance of one partner, made with reference to business transacted by the firm, will bind all the partners." Rapp *v.* Latham, id. 795, 801; Lacy *v.* M'Neile, 4 Dow. & R. 7. See also —— *v.* Layfield, 1 Salk. 292, and French *v.* Rowe, 15 Iowa, 563.

been proved or admitted), of a fact bearing on the issue of a case at bar, is admissible evidence; (*r*) so the existence of

Gill & J. 134; Flannagin *v.* Champion, 1 Green Ch. 51; Bispham *v.* Patterson, 2 McLean, 87; Levy *v.* Cadet, 17 S. & R. 126; Lambeth *v.* Vawter, 6 Rob. (La.) 127; Hamilton *v.* Summers, 12 B. Mon. 11. Of the two views which we have above presented respecting the power of one partner after dissolution to bind his copartners by his acts or declarations, it may be remarked that, while both have something of truth, yet neither, as we think, sets forth the precise principle which should govern the case. On the one hand, though partners after dissolution may be jointly indebted, they are yet joint debtors of a peculiar kind, who possess rights and come under obligations which spring solely from the circumstance that a partnership has been dissolved, and in no way arise from the general relations of ordinary joint debtors. On

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(*r*) The declarations of one partner are of course, as a general rule, admissible in evidence, only when they are admissions, and are supposed to have been made against the interests of the party and of his firm. Independently of statutes, they are competent to charge, but not to exonerate, the partnership. Hence, in a suit against A. & B. as partners, the declarations of A. are inadmissible in behalf of B. to disprove the partnership alleged. Young *v.* Smith, 25 Mo. 341; Clark *v.* Huffaker, 26 id. 264. See Danforth *v.* Corter, 4 Clarke (Ia.), 230. But before one partner's acknowledgments can thus be admitted to affect others as copartners, a joint liability must be shown. A *primâ facie* case of partnership, at least, must first be made out. Nicholls *v.* Dowding, 1 Stark. 81; Gray *v.* Hodson, 1 Esp. 135; Grant *v.* Jackson, Peake, 203; Reimsdyk *v.* Kane, 1 Gall. 635; Teller *v.* Muir, Pennington, 548; Robbins *v.* Willard, 6 Pick. 464; Corps *v.* Robinson, 2 Wash. C. C. 388; Harris *v.* Wilson, 7 Wend. 57; Bucknam *v.* Barnam, 15 Conn. 67; Bispham *v.* Patterson, 2 McLean, 88; Flannagin *v.* Champion, 1 Green, Ch. 51; Grafton Bank *v.* Moore, 13 N. H. 99; Dutton *v.* Woodman, 9 Cush. 255; Alcott *v.* Strong, id. 323. And admissions by a party that he is a partner with others bind himself only. They are not competent evidence of partnership to all. Mont *v.* Mainwaring, 8 Taunt. 139; Burgue *v.* Firmin, 3 Stark. 53; Ditchburn *v.* Spracklin, 3 Esp. 31; Tinkler *v.* Walpole, 14 East, 226; Gibbons *v.* Wilcox, 2 Stark. 43; Parker *v.* Brewer, 3 J. B. Moore, 226; Whitney *v.* Ferris, 10 Johns. 66; Whitney *v.* Sterling, 14 id. 215; McPherson *v.* Rathbone, 7 Wend. 216; Tuttle *v.* Cooper, 5 Pick. 414; Bridge *v.* Gray, 14 id. 61; Grafton Bank *v.* Moore, 13 N. H. 99; McCutchin *v.* Bankston, 2 Kelly, 244; Phillips *v.* Purington, 15 Me. 425; Taylor *v.* Henderson, 17 S. & R. 453; Nelson *v.* Lloyd, 9 Watts, 22; Anderson *v.* Levan, 1 Watts & S. 334; Ostrom *v.* Jacobs, 9 Metc. 454; Mitchell *v.* Roulstone, 2 Hall, 351; Gilpin *v.* Temple, 4 Harr. 190; Evans *v.* Corriell, 1 G. Greene, 25; Fenn *v.* Timpson, 4 E. D. Smith, 276; Kirby *v.* Hewitt, 26 Barb. 607. See Evans *v.* Drummond, 4 Esp. 89, 91; Heath *v.* Sansom, 4 B. & Ad. 172, 175. So it seems to be settled, as a general rule, that a plaintiff cannot prove the partnership, of those whom he had made defendants, by the admissions of one of them made in his answer filed to a bill in equity against him. Rooth *v.* Quin, 7 Price, 193; Field *v.* Holland, 6 Cranch, 8, 24; Van Reimsdyk *v.* Kane, 1 Gall. 630, 635; Clark *v.* Van Reimsdyk, 9 Cranch, 153, 156; Osborn *v.* U. S. Bank, 9 Wheat. 788, 832; Christie *v.* Bishop, 1 Barb. Ch. 105, 116; Chapin *v.* Coleman, 11 Pick. 331. See Studdy *v.* Sanders, 2 D. & R. 347; Pritchard *v.* Draper, 1 Russ. & M. 191; Bevans *v.* Sullivan, 4 Gill, 383.

* 195 a * partnership may be proved by the separate admissions of all who are sued; or by the acts, declarations, and conduct of the parties; or by the act of one, and the declarations or conduct of others. (*s*) If there be a question of

the other hand, the proposition that, upon the dissolution of a partnership, the power of one partner to represent his firm *wholly ceases*, cannot be received as literally true. For, though a partnership may be declared at an end, yet the law continues it for certain purposes, and therewith, also, the power of each partner for the same purposes. The law prolongs the existence of a firm after its formal dissolution, from the necessity of the case, that the joint concerns may be wound up, and hence also prolongs in each partner so much of his former power as is indispensable to the attainment of that end. Hence we think neither the rule of Wood *v.* Braddick, nor its opposite, that adopted by Judge Story and the New York courts, to be correct, or to be founded upon a true view of the subject. The question, how far the acts and declarations of one partner after dissolution are binding upon his copartners, is to be determined, not so much by drawing remote analogies between partners and other classes of joint debtors, as by closely considering the peculiar nature of the partnership connection; and the peculiar rules of law which must, therefore, necessarily be applied to cases arising under it. In this view of the subject, the conclusion would seem to be, as suggested in the text, that, after dissolution, what a partner says or what he does must generally be binding upon his copartners, just so far as the acts or the words are indispensable to the proper winding up of the partnership concerns. But the subject of the power of a partner after his firm has ceased to exist will be considered as a whole when we come to speak of the consequences of dissolution, *post*, ch. 12, § 4. [Whitcomb *v.* Whiting and Jackson *v.* Fairbanks have been much shaken, if not entirely destroyed, as authorities, even in England (see Davies *v.* Edwards, 6 Eng. L. & Eq. 520); and, in this country, very satisfactorily shown to be unsound, by the very learned and vigorous judgment of Mr. Justice Bronson, in Van Keuren *v.* Parmelee, 2 Comst. (N. Y.) 523. It is now generally accepted law, that after known dissolution and after dissolution by bankruptcy or death, which are presumed to be known, one partner cannot, by his act or admission, involve his copartner in any legal liability. See, in England, Watson *v.* Woodman, L. R. 20 Eq. 721, in exposition of the 14th section of the Mercantile Law Amendment Act of 1856; and, in this country, Lange *v.* Kennedy, 20 Wis. 279; Gale *v.* Miller, 54 N. Y. 576; Crumless *v.* Sturgess, 6 Heisk. (Tenn.) 190; Moore *v.* Lackman, 52 Mo. 323; Haddock *v.* Crocheron, 32 Tex. 276; Wilson *v.* Forder, 20 Ohio St. 89; Hall *v.* Lanning, 91 U. S. 160; Conery *v.* Hayes, 19 La. Ann. 325; Myatts *v.* Ball, 41 Ala. 222; Montague *v.* Reakert, 6 Bush (Ky.), 393; Dickinson *v.* Dickinson, 25 Gratt. (Va.) 321; Dowzelot *v.* Rawlings, 58 Mo. 75; Bush *v.* Stowell, 71 Penn. St. 208. *Contra*, in Connecticut, Beardsley *v.* Hall, 36 Conn. 270; and in Pennsylvania, where one partner is authorized by the others to liquidate, Lloyd *v.* Thomas, 79 Penn. St. 68; McCowin *v.* Cubbison, 72 id. 358. But in Michigan it is observed that a liquidating partner can make a new contract. Sheldon *v.* Sheldon, 25 Am. L. Reg. N. S. 292.]

(*s*) Welsh *v.* Speakman, 8 Watts & S. 257; Haughley *v.* Strickler, 2 Watts & S. 411; Johnston *v.* Warden, 3 Watts, 101; Jennings *v.* Estes, 16 Me. 323. In Sangster *v.* Mazarredo, 1 Stark. 161, where the action was assumpsit against four as the acceptors of bills of exchange, three of whom resided abroad and had been outlawed, it was *held*, that an admission of part-

partnership, the admissions of one are evidence against him, but not against the others, unless the partnership be proved. (*ss*) The partnership being proved *aliunde*, entries of account made by one partner during the existence of the firm, are admissible evidence to charge all. (*t*) So notice or knowledge of

nership by one was evidence as against that one of a joint promise by the four; since, in a future action by the present defendant against his codefendants for contribution, the record in the present case would not be sufficient evidence of the joint liability. See Ellis *v.* Watson, 2 Stark. 453, 478. But an admission by one that he is a partner with others is to be construed with reference to the circumstances under which it is made, and, if fairly applicable only to a single transaction, will not be sufficient to establish a general partnership. De Berkom *v.* Smith, 1 Esp. 29. See Ridgway *v.* Philip, 1 Cromp., M. & R. 415. Where the issue of partnership was raised by a plea in abatement for the non-joinder of parties as defendants, the admission of liability as a partner by one not joined in the suit, being good in an action against him, was *held* to be also receivable on this issue to prove him a partner. 2 Greenl. Ev. § 484; Clay *v.* Lanslow, 1 Moody & M. 45.

It was *held* in one case, Whately *v.* Manhim, 2 Esp. 608, that in an action by A. against B. & C. as partners, A. might establish the partnership by putting in evidence a verdict on an issue between B. & C. directed out of a court of equity, to try whether they were partners. But this case has been questioned, by high authority, for reasons that seem entirely conclusive. 2 Stark. Ev. (7th Am. ed.) 808, n. And in Burgess *v.* Lane, 3 Greenl. 65, it was *held*, that a verdict and judgment thereon can be admissible evidence of a copartnership in another action, only when both the parties to the second suit are the same as the parties to the first. See Fogg *v.* Greene, 16 Me. 282; Ellis *v.* Jameson, 17 id. 235; Cragin *v.* Carleton, 21 id. 492; Latham *v.* Kenniston, 13 N. H. 203. See Folk *v.* Wilson, 21 Md. 538.

(*ss*) Crossgrove *v.* Himmelrich, 54 Penn. St. 203; Degan *v.* Singer, 41 Ill. 28. [See also *ante*, p. * 12, note (*l*).]

(*t*) Walden *v.* Sherburne, 15 Johns. 409. See Champlin *v.* Tilley, 3 Day, 307; Noyes *v.* Brumaux, 3 Yeates, 30. And, if a partner has not received his certificate of discharge, his admission will bind his copartners, though made after his bankruptcy. Grant *v.* Jackson, Peake, 203. See Boyce *v.* Watson, 3 J. J. Marsh. 498; Howard *v.* Cobb, 3 Day, 309; Martin *v.* Root, 17 Mass. 227. So, if two partners are garnishees, and one answers for both and acknowledges a joint indebtedness, judgment may be entered against the firm. Anderson *v.* Wanzer, 5 How. (Miss.) 587. See, further, in illustration of the general rule, Vicary's Case, Bac. Abr. tit. "Evidence," 623; Hodenpyl *v.* Vingerhold, Chitty on Bills, 489, note; Cheap *v.* Cramond, 4 B. & Ald. 663; Lucas *v.* De la Cour, 1 Maule & S. 249; Lacy *v.* M'Neile, 4 Dow. & R. 7; Rex *v.* Inhabitants of Hardwick, 11 East, 578, 589; Nicholls *v.* Dowding, 1 Stark. 81; Odiorne *v.* Maxcy, 13 Mass. 182, 15 id. 44; Bridge *v.* Gray, 14 Pick. 61; Bound *v.* Lathrop, 4 Conn. 336; Fisk *v.* Copeland, 1 Over. 383; Reimsdyk *v.* Kane, 1 Gall. 635; Williams *v.* Hodgson, 2 Harris & J. 474; Hart *v.* Palmer, 12 Wend. 523; Cook *v.* Castner, 9 Cush. 266; Fickett *v.* Swift, 41 Me. 65; Foil *v.* McArthur, 31 Ala. 26; Smitha *v.* Cureton, id. 652; Kahn *v.* Boltz, 39 Ala. 66. It makes no difference as to the binding force of the declarations of any one partner, that some of the firm are dormant, Kaskaskia Bridge Co. *v.* Shannon, 1 Gilm. 15, 25; see Lea *v.* Guice, 13 Smedes & M. 656; Corps *v.* Robinson, 2 Wash. C. C. 388; Allen *v.* Owens, 2 Speers, 170; nor that the partner making admissions or acknowledgments respecting joint affairs is not

*196 *any one partner is notice or knowledge affecting all the rest, or rather the partnership as a whole; (*u*) and
*197 such notice, even if *coupled with a demand, as a notice to quit certain premises, (*v*) or a demand on which trover

a party to the suit in which they are offered as evidence, see McCutchin *v.* Bankston, 2 Kelly, 244, 247; Thwaites *v.* Richardson, Peake, 16. But if a partnership is established between codefendants, and the admissions of one are offered in evidence to charge all, the copartners may show that such admissions relate to other than the partnership concerns, Jaggers *v.* Binnings, 1 Stark. 64; or to transactions antecedent to the partnership, Cutt *v.* Howard, 3 Stark. 3; or that they were made by mistake, Ridgway *v.* Philip, 1 Cromp., M. & R. 415. And if a partner makes a purchase, apparently for himself, not mentioning his firm, and afterwards declare that he made the purchase for the use of the partnership, such declaration, by itself, is not admissible to charge the firm for the price of the thing purchased, on the ground of interest in the party making it. White *v.* Gibson, 11 Ired. 283.

(*u*) As in the case of notice by or to one partner in legal proceedings. If one of several, jointly interested in a cargo, effects an insurance for the benefit of all, he may give notice of abandonment for all. Hunt *v.* Royal Exchange Ass. Co., 5 Maule & S. 47. As one partner may bind his firm by giving notice, so he may by receiving it, always supposing the transaction to be *bonâ fide*. Lord Ellenborough, C. J., in Bignold *v.* Waterhouse, 1 Maule & S. 259; Alderson *v.* Pope, 1 Camp. 404, n.; *Ex parte* Waithman, 2 Mont. & A. 364. Thus, if several joint defendants, makers of a promissory note, suffer judgment by default, service of a rule *nisi*, to compute the principal and interest due on the note, made upon one, is service on all; for *quoad hoc* they are partners. Figgins *v.* Ward, 2 Cromp. & M. 424; Carter *v.* Southall, 3 M. & W. 128. See further Mayhew *v.* Eames, 1 C. & P. 550; Lansing *v.* M'Killup, 7 Cow. 416; Powell *v.* Waters, 8 id. 670; Gilly *v.* Singleton, 3 Litt. 249; Fitch *v.* Stamps, 6 How. (Miss.) 487; Hayward *v.* Harmon, 17 Ill. 477; Miser *v.* Trovinger, 7 Ohio St. 281. In like manner, notice to one of two or more partners of a prior unrecorded deed is notice to all the partners, and will render void a subsequent deed of the same land to all the partners. Barney *v.* Currier, 1 D. Chip. 315. See Watson *v.* Wells, 5 Conn. 468. If a bill accepted by a firm is dishonored by one partner, notice of the dishonor need not be given to the other partners; and, if the drawer of a bill be a partner in the house upon which it is drawn, proof of notice to the drawer of the dishonor is not necessary. Porthouse *v.* Parker, 1 Camp. 82; Gowan *v.* Jackson, 20 Johns. 176; Bouldin *v.* Page, 24 Mo. 595. Farther, if a note indorsed by a firm becomes due after its dissolution, notice of dishonor given to one of the late partners will be sufficient, if the holder has not been notified of the dissolution. Nott *v.* Downing, 6 La. 684. See Darling *v.* March, 22 Me. 189, 190. And notice to the surviving partner of the dishonor of a note indorsed by the firm is sufficient to bind the estate of the deceased partner, though the holder knew of the death of the deceased partner before the note became due. Dabney *v.* Stidger, 4 Smedes & M. 749. See Cocke *v.* Bank of Tennessee, 6 Humph. 51. But persons who are joint indorsers of a note or bill, but are not partners, must be severally notified of its dishonor; and, without notice to both, *it seems* that neither can be holden. Shepard *v.* Hawley, 1 Conn. 368; Bank of Chenango *v.* Root, 4 Cow. 126; Dabney *v.* Stidger, *supra*. See 1 Pars. Notes and Bills, 502.

(*v*) Doe d. Eliot *v.* Halme, 2 Man. & R. 433. Otherwise, if the joint lessees are not partners. Goodtitle *v.* Woodward, 3 B. & Ald. 689.

is to be founded, (*w*) may be given or made by one partner on his general authority. Almost the whole law on this subject resolves itself into the rule, that the representations or misrepresentations of a partner are binding on the firm, provided they are made in the course of, and relate to, and are material to, the transaction of the business of the firm.

6. *Of the Power to vary the Business of the Partnership.*

From the same principle, that the power of each partner grows out of the business of the firm, and is measured by it, another rule is drawn, namely, that the business of a partnership is not to be materially varied, except by consent of the other partners. It cannot be changed as to its object and character, nor materially enlarged beyond its originally intended scope; nor can a new branch of business be taken up and added to the old. For the very first thing for a partnership to do is to determine what business it shall transact; that must be the determination of all, and remains in force until changed by all. (*x*) At the same * time there may be an * 198

(*w*) See *ante*, p. * 156 and note.

(*x*) The leading, and perhaps the only case directly bearing upon the proposition of the text is that of Natusch *v.* Irving, cited in the Appendix to Gow on Part. p. 398. There a large number of persons had united in forming a joint-stock company, for the purpose of effecting fire and life assurances. The plaintiff, a shareholder in the company, on behalf of himself and the other shareholders, filed a bill in equity against the president and directors of said company; praying, amongst other things, that they might be restrained from employing the capital, credit, &c., of the said company in the business of marine insurances. Lord Chancellor Eldon, in giving his opinion upon the facts, put the following case: "If six persons join in a partnership of life assurance, it seems clear that neither the majority, nor any select part of them, nor five out of the six, could engage that partnership in marine insurances, unless the contract of partnership expressly or impliedly gave that power; because, if this was otherwise, an individual or individuals, by engaging in one specified concern, might be implicated in any other concern whatever, however different in its nature, against his consent. But if a part of the six openly and publicly professed their intention to engage the partnership in another concern, and clearly and distinctly brought this to the knowledge of one or more of the other partners; and such one or more of the other partners could be clearly shown to have *acquiesced* in such intention, and to have permitted the other partners to have entered upon and to have engaged themselves and the body in such new projects, and thereby to have placed their partners, so engaged, in difficulties and embarrassments, unless they were permitted to proceed in the farther execution of such projects, — if a court of equity would not go the length of holding that such conduct was consent, it would scarcely think

apparent exception to this rule in relation to third parties. If a partner enter into a new branch of business in the name of the firm, but without the authority of the firm, and this is unprofitable, the firm — if they have in no way adopted or ratified the transactions — may refuse to participate in the loss, and cast the whole on that partner, treating it as his several business. And any third party dealing with that partner, and knowing, or having sufficient means of knowing, that he goes beyond the business of the firm and transcends his rights, can look only to him; for the firm may then repudiate this new business as well to this third person as to the partner.(*y*) But it may happen that this new business has nothing in itself to distinguish it from the general business of the firm, and that the third person had no notice that it was so distinguished; then he will hold the firm, and on the same ground on

*199 which he would be *unaffected by any private stipulations or limitations of the firm not made known to him. (*z*)

parties so conducting themselves entitled to the *festinum remedium* of injunction." These principles being applicable as well to a partnership of six hundred as to one of six, his lordship said that "the court would restrain particular members of those bodies from engaging other members in projects in which they have not consented to be engaged, or the engaging in which they have not encouraged, assented to, empowered, or acquiesced in, expressly or tacitly, so as to make it not equitable that they should seek to restrain them." It was further considered that an offer to return to the plaintiff in this suit his capital with interest; or to indemnify him against losses from transactions outside the specified purposes of the institution, or the fact that the plaintiff could sell his shares for more than he gave for them, that any or all these circumstances, did not affect his right to hold his associates to the original business of the partnership, and to prevent them by injunction from transgressing its reasonable limits. See Kean *v.* Johnson, 1 Stock. 401.

(*y*) See *ante*, p. *99, note (*y*), to the point that the nature of the particular business of a firm is generally notice to the world of the limitations thereby put upon the power of each partner; and, consequently, that persons dealing with a partner in matters beyond the scope of that particular business cannot charge the partnership thereon, without proof of that partner's special authority. [Guillou *v.* Peterson, 9 Phila. 225. A partnership is not bound by the acts of another partnership having a common member, unless it authorizes or ratifies such acts. Cobb *v.* Illinois Central R. R. Co., 38 Iowa, 601.]

(*z*) See Barnley *v.* Rice, 18 Tex. 481.

SECTION IV.

OF NEGOTIABLE PAPER.

The whole doctrine of negotiable paper, so far as it differs from the common law of contracts, is derived from the law-merchant. The law of partnership, as we have seen, has no other source. And when they meet, as in the powers of partners to make, indorse, receive, or otherwise deal with negotiable paper, for the partnership, we have a twofold reason for solving the question which this topic presents, by the law-merchant, as that has been established by adjudication, or by that usage of merchants which is the foundation of the law-merchant.

The first remark to be made in this connection is that which must be repeated whenever the powers of partners are under consideration. It is, that as these powers grow out of the business of the partnership, so they are controlled and limited by it. (*a*) And very many other principles are involved in this.

(*a*) It was established, as long ago as the reign of William III., that, "by the custom of England, when there are two joint traders, and one accepts a bill drawn on both, for him and partner, it binds both, if it concerns the trade." Pinkney *v.* Hall, 1 Salk. 126, 1 Ld. Raym. 175. The same doctrine has also been always applied both to the making and to the indorsement of bills of exchange and promissory notes, as well in law as in equity. "In drawing and accepting bills of exchange, it never was doubted but that one partner might bind the rest." Lord Kenyon, in Harrison *v.* Jackson, 7 T. R. 207. See Anon., Styles, 370; Smith *v.* Jarves, 2 Ld. Raym. 1484; Lane *v.* Williams, 2 Vern. 277; Smith *v.* Baily, 11 Mod. 401; Buller N. P. 270; Sutton *v.* Gregory, 2 Peake, 150; Arden *v.* Sharpe, 2 Esp. 525; Swan *v.* Steele, 7 East, 210; Ridley *v.* Taylor, 13 id. 175; Livingston *v.* Roosevelt, 4 Johns. 265; Smith *v.* Lusher, 5 Cow. 689; Manhattan Company *v.* Ledyard, 1 Caines, 191; Kane *v.* Scofield, 2 id. 368; McGowan *v.* Bank of Kentucky, 5 Litt. 271; Commercial Bank of Manchester *v.* Lewis, 13 Smedes & M. 226; Crozier *v.* Kirker, 4 Tex. 252. On the other hand, if there are several drawees or payees of a bill or note, who are not partners, an acceptance or indorsement by one of them will not be the act of all, nor bind all. See Carvick *v.* Vickery, Doug. 653, n., Holt, 297, March, 64, 1 Beawes, 445. The power of each partner to put the name of the firm to negotiable paper is so universally implied from the very existence of the partnership, that stipulations among the partners that one or more of them shall not have this right will not affect third parties, unless made known to them; and this is true whether all the partners be known or whether some be unknown and dormant. Hubert *v.* Nelson, Davies' B. L. 8; Winship *v.* Bank of the United States, 5 Pet. 529, 5 Mason, 176; South Carolina Bank *v.* Case, 8 B. & C. 427; Grant *v.* Hawkes, Chitty on Bills, 42; Bank of Kentucky *v.* Brooking, 2 Litt. 41; Walden *v.* Sherburne, 15 Johns. 409, 413; Whitaker

* 200 * Thus, it is always open to the partners to show that negotiable paper bearing their name was never their paper, or not signed with their name in and for their business; or, if their paper, that it was not transferred on their account; and if this be so, and the third party claiming of them had no belief, grounded on sufficient circumstances, that it was their paper, then they are not held. We have already remarked that an individual is held liable as a partner because he was so in fact, or because he was held out as one. An exactly analogous rule applies to negotiable paper bearing the name of a firm: it binds the firm either if it was their paper negotiated in their business, or if it was "held out" as such; that is, so treated and dealt with by the firm, or with
* 201 their * knowledge and without their objection, as to jus-

v. Brown, 16 Wend. 505; Bank of Rochester *v.* Monteath, 1 Denio, 402. Nor is it incumbent upon persons dealing with a partner to inquire whether he is authorized to sign the partnership name to commercial paper. In the absence of facts to the contrary, they have a right to presume that he has this power. Coursey *v.* Baker, 7 Harris & J. 28; Storer *v.* Hinkley, Kirby, 147; Champion *v.* Munford, id. 172; Hawes *v.* Dunton, 1 Bailey, 146; Drake *v.* Elwyn, 1 Caines, 184; Vallett *v.* Parker, 6 Wend. 615; Porter *v.* Cumings, 7 id. 172; Foster *v.* Andrews, 2 Penn. 160; LeRoy *v.* Johnson, 2 Pet. 186, 197. Nor, with respect to this implied power of each partner, is there any difference between general and special partnerships. Livingston *v.* Roosevelt, 4 Johns. 251. See Davidson *v.* Robertson, 3 Dow, 229; Williams *v.* Thomas, 6 Esp. 18. There are partnerships, however, which are not strictly *trading* partnerships, and in the course of whose business the use of negotiable paper is generally neither customary nor necessary. Partners in such firms have not *primâ facie* or implied authority to bind them by putting the firm name upon bills or notes. Of this sort are professional partnerships, and those for mining and farming purposes. See *ante*, p. *99, note (*y*); p. *156, note (*g*). But the mere circumstance that the business of a firm consists in making profits out of real estate, as in working a stone quarry, will not take the case out of the general rule. Thicknesse *v.* Bromilow, 2 Cromp. & J. 425, 430.

The act of drawing a bill of exchange by one partner, in his own name, upon the firm of which he is a member, for the use of the partnership concern, has been held to be an acceptance of the bill by the drawer in behalf of the firm, and to bind the firm as on an accepted bill. Dougal *v.* Cowles, 5 Day, 511. See also Beach *v.* State Bank, 2 Ind. 488; Miller *v.* Thompson, 3 Man. & G. 576. And *it seems* that in such case, if the partnership were *not* held to be bound at law, yet, if the bill were actually drawn on partnership account, equity would enforce payment of it. Reimsdyk *v.* Kane, 1 Gall. 630. See, as to the subject of this note generally, 1 Pars. Notes and Bills, 123-148. A partner may indorse a note, of which his firm is payee, in the name of his firm, to himself; and may then, in his own name, sue and recover from the maker. Kirby *v.* Cogswell, 1 Caines, 505; Burnham *v.* Whittier, 5 N. H. 334.

tify others in believing it to be their paper, and the making or transfer of it their transaction. (*b*)

(*b*) We have just seen that it is within the general implied power of each partner to bind his firm by all contracts concerning negotiable paper. As against his copartners, the making, accepting, or indorsing of such paper by one partner is valid only when the act is within the scope of the joint business and is *actually on the joint account*. But, as far as third parties are concerned, such act of a single partner charges the partnership, if only it fairly *appear* to be within the joint business and on the joint account. Hence, wherever the partnership name appears on negotiable paper the firm is bound, unless in some way the title of the holder can be impeached. Wintle *v.* Crowther, 1 Cromp. & J. 316, 318; Lane *v.* Williams, 2 Vern. 277; Baker *v.* Charlton, 1 Peake, 80; Arden *v.* Sharpe, 2 Esp. 523; M'Nair *v.* Fleming, 1 Montagu on Part. 37; 3 Dow, 229; 2 Bell Comm. 672; Lloyd *v.* Ashby, 2 B. & Ad. 23; Vere *v.* Ashby, 10 B. & C. 288; Livingston *v.* Roosevelt, 4 Johns. 251; Winship *v.* Bank of the United States, 5 Pet. 529; Etheridge *v.* Binney, 9 Pick. 272, 274; Miller *v.* Manice, 6 Hill, 114. And *it seems* that the fact that the payee of a note, made by one partner in the name of the firm, believed that the money for which the note was given was to be applied to the individual purposes of the acting partner, would not invalidate the note as to the firm, unless such misappropriation really took place. Hamilton *v.* Summers, 12 B. Mon. 11. Nor, if a partner has borrowed money on his own credit, and given his separate note therefor, is it a fraud afterwards to substitute the note of the firm, provided the money borrowed actually came to the use of the firm. Neither, if the original loan was made on the credit of the firm, though the separate note of the borrowing partner was executed for it, would it be a fraud to substitute for the separate security the note of the firm, notwithstanding it did not appear that the money went into the business of the partnership. Union Bank *v.* Eaton, 5 Humph. 499. See Ala. Coal Mining Co. *v.* Brainard, 35 Ala. 476; Connecticut River Bank *v.* French, 6 Allen, 313; Fielden *v.* Lahens, 9 Bosworth, 436; Stephens *v.* Reynolds, 2 Fost. & Fin. 147; Dow *v.* Phillips, 24 Ill. 249; Maynard *v.* Fellows, 43 N. H. 255. [The making or indorsement of a promissory note, in the name of the firm, on presentment by one of the firm, does not bind the firm, if the payee or indorsee knows, or ought from the circumstances to know, that it is on private account, or unless specially authorized or ratified by the other partners. Ditts *v.* Lonsdale, 49 Ind. 529; Reubin *v.* Cohen, 48 Cal. 545; First Nat. Bank *v.* Breese, 39 Iowa, 640; Hotchkiss *v.* English, 6 T. & C. (N. Y. S. C.) 658; Tompkins *v.* Woodford, 5 W. Va. 216; Graves *v.* Kellenberger, 51 Ind. 66; Lime Rock Ins. Co. *v.* Treat, 58 Me. 415; Zuel *v.* Bowen, 78 Ill. 234; Bankhead *v.* Alloway, 6 Cold. (Tenn.) 56; Blodgett *v.* Weed, 119 Mass. 217; Crocker *v.* Colwell, 46 N. Y. 212. But see Bush *v.* Crawford (U. S. C. Ct.), 9 Phila. 392, where it is *held* that nothing short of *bad faith* of the plaintiff can be available as a defence to such a note. See also, to same point, Canadian Bank *v.* Wilson, 36 U. C. Q. B. 9. And if the person receiving such a note indorses the same before maturity to a *bonâ fide* holder, for value, he is liable in damages to the defrauded partners. Calkins *v.* Smith, 48 N. Y. 614. Nor is it a defence to a note given to a partnership, that one of the partners agreed that it might be paid by offsetting a debt due from the partner so agreeing. Harper *v.* Wrigley, 48 Ga. 493. See also Stearns *v.* Houghton, 38 Vt. 583. A firm is not bound for capital contributed by any partner, even if a firm note be given therefor, if the note be given without the authority of the other partners. Wiltram *v.* Van Wormer, 44 Ill. 97; Heap

The making of the note, the signature, indorsement, or waiver of demand or notice, may be fraudulent as against the firm; but the firm will be held if the thing is done apparently in the course of business, and the other party has no privity with the fraud and no notice or knowledge of it. But a party cannot, as to his copartners, waive notice upon a note indorsed by him for his own benefit. (*bb*)

The question has been very much discussed, on whom lies the burden of proof; and we have already alluded to it, in connection with the question to whom credit is given. There is some fluctuation in the adjudication both of England and of this country; but we think there is no material difference in the principles adopted by the two countries. It must be regarded as the general presumption of law, that all paper

* 202 upon which the signature of * the firm has been put by a partner, is the paper and bears the signature of the partnership; and that all transfers of such paper by him were lawful. (*c*) This, therefore, would call on the partnership to

v. Dobson, 15 C. B. N. S. 460; Baxter *v.* Plunkett, 4 Houst. (Del.) 450.]

Where one partner, holding notes for the benefit of the firm, attempts to pawn or pledge them for his own private debts, the court will interfere to restrain it as an act of fraud on his copartners. Stockdale *v.* Ullery, 37 Penn. 486. Moreover, the title of the holder is not affected by any knowledge acquired by him subsequently to his reception of the paper. In Swan *v.* Steele, 7 East, 210, see the very instructive opinion of Lord Ellenborough, C. J.

We shall find this same principle occurring and being applied to nearly all the questions which we are about to consider respecting the liability of a firm upon negotiable paper issued or transferred by one partner. See *post*, p. *211, et seq., respecting cases where paper bearing the firm name, but originally made or afterwards transferred in fraud of the firm, has come into the hands of a *bonâ fide* holder for value.

(*bb*) Windham County Bank *v.* Kendall, 7 R. I. 77.

(*c*) See *ante*, p. *201, note (*b*); Manuf. & Mech. Bank *v.* Winship, 5 Pick. 11; Etheridge *v.* Binney, 9 id. 274; Waldo Bank *v.* Greely, 16 Me. 419; Barrett *v.* Swann, 17 id. 180; Vallett *v.* Parker, 6 Wend. 615; Doty *v.* Bates, 11 Johns. 544; Knapp *v.* McBride, 7 Ala. 19; Ensminger *v.* Marvin, 5 Blackf. 210; Miller *v.* Hines, 15 Ga. 197; Thurston *v.* Lloyd, 4 Md. 283; Manning *v.* Hays, 6 id. 5; Powell *v.* Messer, 18 Tex. 401; Hickman *v.* Kunkle, 27 Mo. 401; [Carrier *v.* Cameron, 31 Mich. 373.] If a creditor of a partnership take a bill from his debtors, drawn by them upon another firm, and this bill is afterwards, in the usual course of business, accepted in the name of the firm drawn upon, though by a partner who is also a member of the drawing firm, it cannot, in such a case, be inferred as matter of law from this latter fact, standing alone, that the purpose of the parties, or even that the effect of the transaction, is to subject the funds of the acceptors to the payment of the debt. These facts alone appearing, the acceptance is, *primâ facie*, an acceptance on the joint ac-

discharge itself, and therefore would lay the burden of proof on them.

Thus far the law seems to be clear. Then the American adjudication very decidedly assumes that the third party taking this paper, with the knowledge that it was given for the private and personal debt only of one partner, knows enough to put him on his guard, and that he is now bound to inquire whether the firm authorized this use of their name, and can only hold them on the ground that they did so authorize it in fact; and this he must show as the foundation of his claim. In other words, the American courts hold the doctrine that a third party taking from a partner the signature of his firm for his own debt, cannot hold that firm, without proof of authority, adoption, or ratification by the firm. (*d*) We should say

count of the accepting firm, and binds a partner therein who is not a member of the drawing firm, and did not expressly assent to it. Tutt *v.* Addams, 24 Mo. 186. See Phinsen *v.* Negley, 25 Penn. St. 297. Nor is the fact that a draft or bill, made in the name of the firm, is made payable to the order of one of the partners, any indication that the paper was not drawn on partnership account, and in the usual course of the business of the firm. Nor is the presumption that a draft or bill, so signed, is regular partnership paper, changed by showing that such paper was discounted at the request of the partner who drew the draft in the name of the firm whose name was inserted as payee, who indorsed it, and drew out the proceeds. Haldeman *v.* Bank of Middletown, 28 Penn. St. 440; Phinsen *v.* Negley, *supra*. See Pierce *v.* Jackson, 21 Cal. 636; Uhler *v.* Browning, 4 Dutch. 79; Hurd *v.* Haggerty, 24 Ill. 171; Littell *v.* Fitch, 11 Mich. 525.

[A., the indorser of a promissory note made by B., one member of a firm consisting of B. & C., payable to the order of A., who indorsed it to C., A.'s indorsement being for the accommodation of the firm, may maintain an action against B. & C. jointly, to recover the amount which he, A., may have been compelled to pay. Thayer *v.* Smith *et al.*, 116 Mass. 363.]

(*d*) Chazournes *v.* Edwards, 3 Pick. 5; Homer *v.* Wood, 11 Cush. 62; Davenport *v.* Runlett, 3 N. H. 386; Williams *v.* Gilchrist, 11 id. 535; Livingston *v.* Hastie, 2 Caines, 246; Lansing *v.* Gaine, 2 Johns. 300; Livingston *v.* Roosevelt, 4 id. 251; Laverty *v.* Burr, 1 Wend. 529; Wardell *v.* Hughes, 3 id. 418; Whitaker *v.* Brown, 11 id. 75; Gansevoort *v.* Williams, 14 id. 133; Joyce *v.* Williams, id. 141; Wilson *v.* Williams, id. 146; Baird *v.* Cochran, 4 S. & R. 397; Cotton *v.* Evans, 1 Dev. & B. Eq. 284; Abpt *v.* Miller, 5 Jones, 32; Weed *v.* Richardson, 2 Dev. & B. 535; Hagar *v.* Mounts, 3 Blackf. 261; Taylor *v.* Hillyer, id. 433; Hickman *v.* Rieneking, 6 id. 387; Rogers *v.* Batchelor, 12 Pet. 221; Mauldin *v.* Branch Bank at Mobile, 2 Ala. 502; Darling *v.* March, 22 Me. 184; Brown *v.* Duncanson, 4 Harris & McH. 350; Poindexter *v.* Waddy, 6 Munf. 418; Robertson *v.* Mills, 2 Harris & G. 98; Stearns *v.* Burnham, 4 Greenl. 84; Elliott *v.* Dudley, 19 Barb. 326; Lanier *v.* McCabe, 2 Fla. 32; Tutt *v.* Addams, 24 Mo. 186; Powell *v.* Messer, 18 Tex. 401; Clay *v.* Cottrell, 18 Penn. St. 408. The fact that a note given by one partner, in the name of his firm, but mainly for his own debt, includes

*203 that the weight of *authority in the English courts is *204 in favor of rules substantially *similar. (*e*) That is,

within it a small debt of the firm, will not make the firm liable on the note. King *v.* Faber, 22 Penn. St. 21. And wherever the firm name is put by one partner upon negotiable paper under circumstances which make the trans-

(*e*) The English and American rules on this point have frequently been contrasted in the courts of this country. The views taken of the points of difference between the two, though variously stated, are in the main in unison with those of the text. Thus in Chazournes *v.* Edwards, 3 Pick. 5, Parker, C. J., after stating the American rule, says: "The only case which has a contrary tendency is that of Ridley *v.* Taylor, 13 East, 175, in which case, however, the principle above stated is admitted; but it was thought that the facts did not show that knowledge on the part of the creditor which would constitute the transaction fraudulent on his part. There were circumstances in the case from which it was thought the plaintiffs might reasonably infer that the bill given to them by their debtor was one which he had a right within his general authority as a partner to transfer. Though the decision does not seem to be in exact conformity with the rule as before settled in several cases, yet the principle is clearly admitted." In Dob *v.* Halsey, 16 Johns. 38, Spencer, J., thus expresses the distinction: "The only difference between the decision of this court and that of the King's Bench consists in this: We require the separate creditor, who has obtained the partnership paper for the private debt of one of the partners, to show the assent of the whole firm to be bound. The rule of the King's Bench throws the burden of avoiding such security on the firm, by requiring them to prove, that the act was covinous on the part of the partner for whose private debt the paper of the firm was given, by showing that it was done without the knowledge, and against the consent, of the other partners, and that the fact was known to the separate creditor when he took the paper of the firm." See Laverty *v.* Burr, 1 Wend. 529, 531, opinion of Sutherland, J. The opinion of Nelson, J., in Gansevoort *v.* Williams, 14 Wend. 133, upon the same point, is very full and elaborate. He says: "The English cases upon this subject are not always consistent with themselves; and even the same court, while they profess to adhere to this general position, namely, that the partner denying the authority of his associate must prove affirmatively that the holder knew the paper was given in a transaction unconnected with the partnership, and also that he did not assent, sometimes substantially disregard the latter qualification of the rule in the application of it to facts." He illustrates the above remarks by a citation of some of the leading English authorities, from the examination of which he concludes "that while the English courts hold to the position that the firm is liable on a bill or note made by one out of the partnership business, unless the holder knows that it was so made, and that the other partners did not concur, the frequent practical operation and effect of it under their direction does not essentially differ from the rules as settled in this court. They undoubtedly put the defence of the copartner upon the ground of fraud, committed upon him by his associate and the holder; but this is sometimes inferred from the fact that the bill or note is given for a private debt, and that known to the holder; and at other times further proof is required negativing a presumed concurrence of the copartner." See opinion of Bronson, J., in Wilson *v.* Williams, 14 Wend. 146, 158; of Tracy, Senator, in State *v.* Catskill Bank, 18 id. 480; Rogers *v.* Batchelor, 12 Pet. 221; Bank of Tennessee *v.* Saffarans, 3 Humph. 597.

they also hold, that, if a creditor of one partner * take * 205
partnership paper in payment of his debt from that

action actually or constructively fraudulent, and therefore void as to the firm, the bill or note, also, is void in the hands of the fraudulent holder as to any of the other parties to it; for, otherwise, the partnership would eventually be made reliable upon it. Ridley *v.* Taylor, 13 East, 175; Livingston *v.* Hastie, 2 Caines, 246; Chazournes *v.* Edwards, 3 Pick. 5; Williams *v.* Walbridge, 3 Wend. 415; Hagar *v.* Mounts, 3 Blackf. 261. But see Bowen *v.* Mead, 1 Mann. (Mich.) 432. As to the question of the consent of the firm to the act of one partner, by which he pledges the partnership name for his private debt, it is not a matter of legal presumption, but a matter of fact, of which the jury must be satisfactorily convinced. Hence, where the jury were instructed that, if one of two partners was present and heard the other partner make an arrangement by which the partnership name was pledged in a matter outside of the partnership concerns, the law would presume that the former assented to it, it was *held*, that such instruction was ground for a new trial. Mercein *v.* Andrus, 10 Wend. 261; Foster *v.* Andrews, 2 Penn. St. 160; Jones *v.* Booth, 10 Vt. 268; McKinney *v.* Brights, 16 Penn. St. 399. But where a partner gives the partnership name for his individual debt, the assent of his copartners to the act, or their ratification of it, may be implied from circumstances, and need not be proved by express agreement. Gansevoort *v.* Williams, 14 Wend. 133; Noble *v.* M'Clintock, 2 Watts & S. 152; Chazournes *v.* Edwards, 3 Pick. 11; Cotton *v.* Evans, 1 Dev. & B. Eq. 284; Abpt *v.* Miller, 5 Jones, 32; Brewster *v.* Mott, 4 Seam. 378; Powell *v.* Messer, 18 Tex. 401; Kemegs *v.* Richards, 11 Barb. 312; Wheeler *v.* Rice, 8 Cush. 205. See Elliott *v.* Dudley, 19 Barb. 326. Nor need there be any new and independent consideration for the act of the partners, ratifying and promising to be bound by the act of a copartner who has wrongfully used the partnership name for his own benefit. Commercial Bank *v.* Warren, 15 N. Y. 577. In Flagg *v.* Upham, 10 Pick. 147, it appeared that Valentine, one of two partners, had given the firm note for his several debt; and that afterwards his copartner, acting under a mistake of law, acknowledged himself liable upon the note, and gave his written guaranty for its payment. The payee, bringing his action upon the guaranty, the court said: "The note was made in the partnership name, purported to bind both partners, and was binding upon the partners, if made with their consent. Supposing it to be made by Valentine for his several debt, without the consent of the defendant, it would not, indeed, be binding upon him; but no one else could make the objection, and it depended on himself to insist on, or to waive, the objection. Under these circumstances, knowing the terms of the partnership between Valentine and himself, and knowing the consideration for which the note was given, we are of opinion that his acknowledgment of his own liability, and his express obligation to guarantee the payment, were a waiver of any objection which he might have made to the note, and therefore that this guarantee was given upon a good consideration, and that he is bound by it." See Stearns *v.* Burnham, 4 Greenl. 84; Leverson *v.* Lane, 13 C. B. N. S. (106 Eng. Com. L. R.) 278. In Taylor *v.* Hillyer, 3 Blackf. 433, where one of two partners had given a note, in the name of his firm, for his private debt, and this was known to the payee, a subsequent oral promise by the other partner to pay the note was deemed to be within the statute of frauds, and therefore not binding on him. See Mercein *v.* Andrus, 10 Wend. 461; Fielden *v.* Lahens, 9 Bosw. 436; Whitmore *v.* Adams, 17 Iowa, 567; Burleigh *v.* Parton, 21 Tex. 585.

partner, and there are no further facts in the case, the partnership would not be held, and the act of the holder of that paper would be deemed fraudulent in law. (*f*) But, if further facts come in, these do not seem to be construed with the same severity, in reference to the holder, as they would be in this country. Thus, if the paper be larger than the debt, and not agreeing with it in point of time, and is indorsed before the holder sees it, such facts have been considered as war-
* 206 ranting the conclusion that the holder honestly * believed, and might rationally have believed, that the firm

(*f*) This is the principle of Hope *v.* Cust, cited by Lawrence, J., in 1 East, 52. The same principle was applied in Shirreff *v.* Wilks, 1 East, 48, the case in which Hope *v.* Cust, *supra*, was cited. Lord Kenyon, C. J., said: "This is an action brought against three persons, Wilks, Bishop, and Robson, as acceptors of a bill of exchange. It appears that the acceptance was in fact made by Bishop alone, in the name of the firm. The consideration for this bill was some porter, which had been sold by the plaintiffs to Wilks & Bishop only, at a time when Robson had no concern with the house. When the plaintiffs, knowing this, draw the bill upon all the three partners, and knowingly take an acceptance from one of them to bind the other two, one of whom, Robson, had no concern with the matter, and was no debtor of theirs, — no assent of his being found, and nothing stated to show that he had any knowledge of the transaction. It is hard enough for one partner in any case to be able to bind another without his knowledge or consent; but it would be carrying the liability of partners for each other's acts to a most unjust extent, if we suffered a new partner to be bound in this manner for an old debt incurred by other persons. The plaintiffs, therefore, ought not in justice to have taken this security, by which they were to bind one who was not their debtor: the transaction is fraudulent upon the face of it." So in Green *v.* Drakin, 2 Stark. 347. There H. and B. being partners, the plaintiff lent H. 500*l.* to enable him to enter into partnership with D., the defendant, and shortly after, D., H., and B. became partners. To pay part of the sum borrowed, H. drew a bill of exchange in the partnership name, to his own order, and indorsed the same to the plaintiff. Being called as a witness, he testified that he had drawn the bill in question without the knowledge of his copartners, but that the plaintiff did not know this. The defendant had given no notice of his intention to dispute the consideration of the bill. But Lord Ellenborough was of opinion that the nature of the transaction was intrinsically notice, and he directed that the plaintiff should be nonsuited, on the ground that one partner had no right to bind another without his knowledge, by drawing a bill for his own private debt. *Ex parte* Goulding, 2 Glyn & J. 118. See Jones *v.* Yates, 9 B. & C. 532; *Ex parte* Thorpe, 3 Mont. & A. 716; *Ex parte* Bonbonus, 8 Ves. 540; *Ex parte* Peele, 6 id. 604; May *v.* Chapman, 16 M. & W. 355; Smith *v.* Coleman, 7 Jur. 1053. In Franklin *v.* M'Gusty, 1 Knapp, 301, the Master of the Rolls said: "I take it to be clear, from all the cases upon the subject, that it lies upon a separate creditor who takes a partnership security for the payment of his separate debt, if it be taken *simpliciter*, and there is nothing more in the case, to prove that it was given with the consent of the other partners." And see Blinn *v.* Evans, 24 Ill. 317.

authorized the transfer. (*g*) But, while it is true that paper agreeing * in amount and time with the debt, and * 207

(*g*) The principal case is Ridley *v.* Taylor, 13 East, 175. The plaintiffs in November, 1806, sold to Ewbank, of the firm of Ord & Ewbank, linen drapers, on his separate account, a cargo of coals, to the amount of 34*l.* 11*s.* In May following, Ewbank paid 5*l.* on account, and gave his note for the balance. This note was dishonored, and taken up by the plaintiffs, who shortly after received from Ewbank, for the same balance, the bill in suit. This bill, for 40*l.*, was drawn and indorsed by Ewbank in the style and firm of Ord & Ewbank, and was before that time accepted by the defendant Taylor. After delivering this acceptance to the plaintiffs, Ewbank applied to the plaintiffs for the balance of 9*l.* 19*s.* 9*d.*; but the plaintiffs refused to pay it until the bill upon the defendant should have been paid. The plaintiffs negotiated the bill for 40*l.*, but were subsequently obliged to pay it, and thereupon debited Ewbank alone for the amount. Ord & Ewbank having become bankrupt, the defendant was sued as acceptor, and a verdict found for the plaintiffs to the amount of the bill, subject to the opinion of the court on the above facts. It was *held*, in the King's Bench, that the verdict should stand to the amount of Ewbank's debt.

The same circumstances, of the partnership paper being for an amount larger than the private debt, and of its being drawn, accepted, and indorsed before the creditor saw it, and of its differing in point of time, seem to have determined the opinion of the court in *Ex parte* Kirby, 1 Buck, 511. There T., M., and F. were in partnership, under the firm of M., F., & Co. T. also carried on business on his own account, and, being separately indebted to K. to the amount of 100*l.*, he sent to K. a bill of exchange for 300*l.* already drawn and accepted, and also indorsed by M., F., & Co., the payees, but which wanted nearly three months of being due. At the same time, T. requested K. to place 100*l.* to his credit, and to send him a bill for the balance, 200*l.* K. accordingly sent a draft for 200*l.*, which was duly paid. The bill for 300*l.* being dishonored, and M., F., & Co. having become bankrupt, K. was held to have made a *bonâ fide* exchange of security, and to be entitled to prove against the joint estate, though not against the separate estate of T.

Upon the same principle, apparently, it was *held*, in *Ex parte* Bonbonus, 8 Ves. 540, that the mere fact that money advanced to one partner upon the security of the firm was carried to his separate account, even with the knowledge of the lender, was not sufficient to make the transaction fraudulent as to the other copartners, and thereby to discharge the firm from liability. The facts were as follows: Rogers was a merchant in Bristol, on his individual account; he also was in partnership with Blake & Parnell in the business of insurance brokers. But the private and partnership concerns in which Rogers was engaged, though both were carried on at Bristol, were conducted in separate establishments; and the accounts of the two concerns were kept in distinct sets of books. Parnell was the manager of the partnership concern. A commission of bankruptcy issued against Rogers, and at the same time against Rogers, Blake, & Parnell. Under the joint commission, Atwood & Co., bankers, proved a very large sum, advanced to Rogers upon partnership notes, drafts, or bills. The joint creditors prayed that the above proof of Atwood & Co., under the joint commission, might be expunged; and, in support of their petition, suggested that all the said bills or notes, except two, were drawn by Rogers, or by his direction, without the privity of Parnell; that they were all made at the same time, though bearing different

therefore more obviously made for the debt, would be
* 208 more suspicious, we have some doubt * whether this coin-

dates, and for a very large sum advanced within a very short space of time, while Rogers was greatly harassed and threatened by his creditors; that no part of the consideration came to the hands of Parnell, or to the use of the firm, but exclusively to Rogers. Lord Eldon said: "This petition is presented upon a principle which it is very difficult to maintain, that if a partner, for his own accommodation, pledges the partnership, as the money comes to the account of the single partner only, the partnership is not bound. I cannot accede to that. I agree, if it is manifest to the persons advancing money that it is upon the separate account, and so, that it is against good faith that he should pledge the partnership, then they show that he had authority to bind the partnership. But if it is in the ordinary course of commercial transactions, as upon discount, it would be monstrous to hold, that a man borrowing money upon a bill of exchange, pledging the partnership, without any knowledge in the banker that it is a separate transaction, merely because that money is all carried into the books of the individual, therefore the partnership should not be bound. No case has gone that length. It was doubted whether Hope *v.* Cust was not carried too far, yet that does not reach this transaction; nor Shirreff *v.* Wilks, as to which I agree with Lord Kenyon, that, as partners, whether they expressly provide against it in their articles (as they generally do, though unnecessarily) or not, do not act with good faith when pledging the partnership property for the debt of the individual, so it is a fraud in the person taking that pledge for his separate debt." Further, it has been held both here and in England, that if one partner, to pay his separate debt, give the partnership acceptance to an amount greater than the debt, the creditor may, in an action against the firm, recover the difference between the amount of the bill and his separate demand; the whole transaction, it seems, not being vitiated by the fraud as to part. Thus, in Wintle *v.* Crowther, 1 Crompt. & J. 316, the defendants, Crowther & Combes, were sued as the acceptors of two bills of exchange, — one for 130*l.* 10*s.* 6*d.*, the other for 45*l.* 10*s.* Respecting the former bill, these facts were in evidence: Crowther & Combes carried on business in partnership as coal merchants, Combes being a dormant partner. Crowther was also engaged in another kind of business on his separate account, and therein became separately indebted to the plaintiffs for 80*l.* The plaintiffs drew on him two bills of exchange; the one for 40*l.*, the other for 38*l.* 8*s.* 6*d.*, the first of which was dishonored. When the second became due, Crowther took to the plaintiff the bill for 130*l.* 10*s.* 6*d.*, which was accepted in the name of Crowther & Co. in the handwriting of Crowther. The two separate bills of Crowther were given up, and, as the evidence indicated very strongly, in exchange for the partnership bill for 130*l.* 10*s.* 6*d.* The cause was twice tried. Upon the first trial, a verdict was found for the defendants; but it was set aside as being against evidence. Upon the second trial, the jury found for the plaintiffs upon both bills; and the plaintiffs having consented to reduce this verdict by the amount of Crowther's two separate bills for 40*l.* and 38*l.* 8*s.* 6*d.* (a clear admission of fraud, as to that part of the transaction at least), it was *held* in the Exchequer that they might retain their verdict for the residue. Wilson *v.* Lewis, 2 Scott's N. R. 115; Gamble *v.* Grimes, 2 Cart. (Ind.) 392. See also Barber *v.* Backhouse, 1 Peake, 61.

The English rule seems to be very clearly stated by the Master of the Rolls, in Frankland *v.* M'Gusty, 1 Knapp, 301: "I take it to be clear, from all the cases upon the subject, that it lies upon a separate creditor

cidence between the private debt to be paid, and the paper of the firm which pays it, with no evidence of authority or adoption by the firm, would always be sufficient, in England, to discharge the firm. But, on the other hand, we are quite confident that American courts would require better reason for believing in the good faith of the holder, than any coincidence between the date and amount of the firm's paper and those of the private debt which it pays or secures. In other words, the fact that the private creditor of a partner takes from him the paper of the firm to pay his debt, raises a stronger presumption of fraud in this country than in England.

Lord Eldon says, very truly, that it may be of great moment to a partnership that the mercantile credit of one of the part-

who takes a partnership security for the payment of his separate debt, if it be taken *simpliciter*, and there is nothing more in the case, to prove that it was given with the consent of the other partners. But there may be other circumstances attending the transaction, which may afford the separate creditor a reasonable ground of belief that the security so given in the partnership name is given with the consent of the other partners; and these circumstances occurred in the case which was cited, and which seemed to be inconsistent with the other authorities. I refer now to the case of Ridley *v.* Taylor. In that case the bill was dated eighteen days before its delivery by the partner, to his separate creditor, and it was not known by the creditor that it was drawn and indorsed by the debtor alone; and the bill was to a greater amount than the separate debt. The court, therefore, were of opinion, that there was reasonable ground for the separate creditor believing it not to have been given to him in fraud of the partnership, and that the general presumption, that a partnership security, when applied in payment of a separate debt, is in fraud of the partnership, was repelled by the special circumstances which belonged to that particular occasion. Upon a consideration, therefore, of all the authorities, I am of opinion that the law is, that taken *simpliciter* the separate creditor must show the knowledge of the partnership; but, if there are circumstances to show a reasonable belief that it was given with the consent of the partnership, it lies upon the partners to prove the fraud. I think that will reconcile all the cases." We have already seen [p. *203, note (*d*)], that, in this country, if one partner use the partnership paper under such circumstances of separate advantage to himself, and of collusion or of negligence on the part of the one dealing with him, as to make the transaction *primâ facie* fraudulent and void as to the firm, the firm may still be held upon proof of its previous consent to, or subsequent adoption of, the single partner's act. The same is also the doctrine of the English courts. Thus, in *Ex parte* Bonbonus, stated above, Lord Eldon said: "There is no doubt now, the law has taken this course; that if, under the circumstances, the party taking the paper can be considered as being advertised in the nature of the transaction, that it was not intended to be a partnership proceeding, as if it was for an antecedent debt, *primâ facie* it will not bind them: but it will, if you can show previous authority or subsequent approbation; a strong case of subsequent approbation raising an inference of previous positive authority." See Tallmadge *v.* Penoyer, 35 Barb. 120.

ners should be preserved, and that the courts should not embarrass the lawful use of the paper of a firm, by a partner, for his own accommodation, seeing that this is often connected with the advantage of the firm. (*h*) But to all considerations of this kind there is one answer. The power of a partner is limited by the business of the firm; he who knows that a partner's act is not within the business of the firm, knows that it is not authorized; and, if all he knows is that the act of the
* 209 partner is for his own * immediate and direct and several benefit, he has no right to presume that the firm are benefited also, and therefore authorized it; because it is generally very easy for him to ascertain how this is, if he wishes not to be a party to a fraud.

Similar doctrines must be applied if a partner disposes of any other securities; or of the goods or property of any kind, of the firm, in payment of his personal debt, or for his
* 210 personal relief. (*i*) * And, generally, the true rule

(*h*) *Ex parte* Bonbonus, 8 Ves. 544. See The Trader's Bank of Rochester *v.* Bradner, 43 Barb. 379; Freeman *v.* Carpenter, 17 Wis. 126.

(*i*) Thus where two firms are partners in a contract to supply provisions for the navy, and one firm consigns goods to the other with which to perform the joint contract; if the latter house pledge the bill of lading of such goods as security for their own separate debts, and their separate creditor is conusant of all the facts, the pledge is fraudulent and void. Snaith *v.* Burridge, 4 Taunt. 684. And if one partner assign or transfer to his separate creditor, in discharge of his separate debt, partnership stock in trade, securities, funds, &c., and such property is known to the creditor to belong to the firm, the same principle must apply as in the case of a like transfer of partnership negotiable paper. The partnership cannot be concluded without their consent, by such application of its funds and the discharge of the one partner's private debts. Dob *v.* Halsey, 16 Johns. 34; Halstead *v.* Shepard, 23 Ala. 558; Nall *v.* McIntyre, 31 id. 532. See Bourne *v.* Wooldridge, 10 B. Mon. 492; Daniel *v.* Daniel, 9 id. 195. The courts of this country have gone yet further. In Jones *v.* Yates, 9 B. & C. 532, Sykes & Bury being in partnership, Sykes fraudulently gave the bills of the partnership in discharge of his separate debt. He likewise applied partnership funds to the same purpose, his creditor being conusant of and privy to these fraudulent transactions. The firm of Sykes & Bury having brought trover for the bills and assumpsit for the money, it was *held* that they could not recover. Lord Tenterden: "It was said, in support of the argument, that the property did not pass from Sykes by his wrongful act, but remained in Sykes & Bury. This was ingeniously and plausibly put: but as against Sykes the property did pass at law; and there was no remedy at law for Bury to recover it back again; he could not do so without making Sykes a party." But here it seems to be pretty well settled, that if the creditor of one partner receive for his debt partnership property, without the knowledge or consent of the other partners, the title of the

should be, and we are confident that it is so in the United States, that any act whatever of a partner, certainly for his own individual and several benefit, and not obviously for that of the firm also, does not bind the firm, until the holder proves their authority or ratification. When a note signed in the firm name was given not for partnership purposes, and a partner said he would settle it, "if he could get the books, notes, and accounts from the partner who signed the note," and he did not get them, it was held that he was not liable. (*ii*) And a release, by one partner, of a debt due to

partnership is not divested, and the creditor acquires nothing by the transfer, whether the property thus taken belong to the partnership or not. Rogers *v.* Batchelor, 12 Pet. 221; Brewster *v.* Mott, 4 Scam. 378; Kelley *v.* Greenleaf, 3 Story, 93; Hester *v.* Lumpkin, 4 Ala. 509, 514; Buck *v.* Mosley, 24 Miss. 170; Tanner *v.* Hall, 1 Barr, 417, 418; Goode *v.* McCartney, 10 Tex. 193. These cases proceed upon the intelligible ground, "that one partner cannot apply the partnership funds or securities to the discharge of his own private debt, without the consent of his copartners; and that, without their consent, their title to the property is not divested in favor of such separate creditor, whether he knew it to be partnership property or not. In short, his right depends not upon his knowledge that it was partnership property, but upon the fact, whether the other partners had assented to such disposition of it or not." Per Story, J., in Rogers *v.* Batchelor, *supra;* [Geery *v.* Cockroft, 37 N. Y. Sup'r Ct. 147.] The principle here laid down is entirely consistent with that we have just been considering respecting the application by one partner of negotiable paper, bearing on its face the name of the firm, to his separate debts. Nor is it at all in conflict with another rule to which we shall presently come; namely, that the firm is bound by mercantile paper bearing its signature, in the hands of a *bonâ fide* holder for value, however fraudulent may have been its inception. And see Hayward *v.* French, 12 Gray, 453, and Cadwallader *v.* Kroesen, 22 Md. 204.

(*ii*) Burleigh *v.* Parton, 21 Tex. 585. [Nor can the purchaser of goods from a firm plead, in payment or setoff, a debt due him from one of the firm. Wise *v.* Copley, 36 Ga. 508. Nor can a creditor of a partner, by an attachment and sale of firm property, on execution, for his private debt, acquire title as against the creditors of the firm. Miner *v.* Pierce, 38 Vt. 610. A sale by a partner of part of the firm property, the proceeds to be applied to the private account of the partner, is fraudulent as against the other partners, and gives the purchaser no title as against them. Williams *v.* Barrett, 10 Kansas, 455; Stegall *v.* Coney, 49 Miss. 761. If a partner fraudulently appropriate the funds of a firm to the purchase of real estate, or to the payment of life-insurance premiums on a policy for the benefit of his wife, a court of equity will follow the funds and their proceeds, and appropriate them to the use of the firm. Shaler *v.* Trowbridge, Ct. of Er. & Ap. (N. J.), 5 Reporter, 214. One who takes, in payment of the individual note of A., for his private debt, notes payable to A., but belonging to the firm of which he was a member, has a good title, if he was ignorant of the fact of partnership. Kellogg *v.* Fancher, 23 Wis. 21. The banker of a firm who knowingly transfers funds of the firm to the private account of one of the firm, for the purpose of speculation, is liable to the other partners for the funds so trans-

the partnership, or a receipt of payment, which he has unquestionably authority to give if in good faith, will be inoperative if given for a consideration which is known, or ought to be known, to inure only to his own benefit. And many decisions illustrating this principle may be found in the note. (*j*)

ferred. Billings *v.* Meigs, 53 Barb. (N. Y. S. C.) 272. And, generally, a partner cannot use partnership funds or credits to pay his private debts, or promote his private interests. McNair *v.* Platt, 46 Ill. 211; Broadus *v.* Evans, 63 N. C. 633; Downing *v.* Linville, 3 Bush (Ky.), 472; Wise *v.* Copley, 36 Ga. 508.]

(*j*) Everenghim *v.* Ensworth, 7 Wend. 326; Gram *v.* Cadwell, 5 Cow. 489; Farrar *v.* Hutchinson, 9 A. & E. 641; Greeley *v.* Wyeth, 10 N. H. 16; Minor *v.* Gaw, 11 Smedes & M. 322. See, however, Halls *v.* Coe, 4 McCord, 136; Beckham *v.* Peag, 2 Bailey, 133. An arrangement is sometimes made between one partner and a customer of the firm, by which it is agreed that goods sold or services rendered to such customer by the partnership shall be paid for by a debt due from that partner alone, or by articles furnished for his separate use. Thus, one of a firm of grocers may agree with a tavern-keeper that the debt of the latter for provisions bought of the partnership shall be set off against the debt of the former for entertainment furnished at the inn. Is such an engagement, entered into by one partner, valid as against his copartners, who are not privy to it? The adjudications seem to be somewhat in conflict. But the doctrine of quite a number of cases seems to be, that as one partner has an undoubted right to sell the goods of the partnership, or to contract for its services; and as he may take pay therefor in behalf of the partnership in either specific articles or money; and as an appropriation by him of such articles or money, once received for the partnership, to his private use, would not subject the party from whom he received them to an action by the firm, — the nature of the case is not changed, if the party, thus dealing with one partner, knows at the time that what he pays for labor, materials, &c., furnished him by the partnership, is intended to come to the use of that partner alone. The disposition of the articles, or money, received by one partner, for benefits conferred by the partnership, is a matter entirely between the different partners. Greeley *v.* Wyeth, 10 N. H. 15; White *v.* Toles, 7 Ala. 569; Strong *v.* Fish, 13 Vt. 277; Halls *v.* Coe, 4 McCord, 136; Henderson *v.* Wild, 2 Camp. 561; Perry *v.* Butt, 14 Ga. 699. See also M'Kee *v.* Stroup, Rice, 291; Arnold *v.* Brown, 24 Pick. 89, 93; Yale *v.* Yale, 13 Conn. 185: *contra*, Pierce *v.* Pass, 1 Porter, 232; Goode *v.* M'Cartney, 10 Tex. 193; Norment *v.* Johnson, 10 Ired. 89; Ramey *v.* McBride, 4 Strobh. 12. The practical rule applicable to the point is, we think, well stated in Warder *v.* Newdigate, 11 B. Mon. 174, 177. Where the plaintiffs, partners, had boarded with the defendant, and each had told him "that what one might call for would be the same as if both should order it," the defendant's account for liquors, &c., furnished to each, was *held* to create a joint indebtedness, and to constitute a valid counter-claim to the demand of the two plaintiffs for goods sold and delivered. Hartung *v.* Siccardi, 3 E. D. Smith, 560. It has been *held*, that a suit at law cannot be maintained in the names of all the partners, for a debt from which one of the joint plaintiffs has already discharged the defendant, although such discharge may have been a fraud upon the firm, in which the released debtor was participant; as where it has been given in consideration of one partner's receiving a discharge from his private and separate debt. Jones *v.* Yates, 9 B. & C.

Taking the individual note of a member of a firm for goods sold to the firm will not discharge the other members from liability for the goods, unless there be an agreement with the firm to that effect. And this is so although the note be negotiable, if it remains in the hands of the payee. (*jj*)

*A bill of exchange thus drawn fraudulently or so *211 accepted, or a promissory note so made or indorsed, does not bind the firm to an indorsee of the original wrongful holder or indorsee, even if this second indorsee be wholly innocent, unless he can show that he paid a consideration for it. (*k*)

532, 539; Wallace *v.* Kelsall, 7 M. & W. 264; Gordon *v.* Ellis, 7 Man. & G. 607, 621; Greeley *v.* Wyeth, 10 N H. 15; Homer *v.* Wood, 11 Cush. 62. Upon similar grounds, it is said, if a partnership draw a bill of exchange, and one partner agrees with the drawee, though in fraud of the firm, that he will provide for it when due, the firm cannot maintain an action on the bill against the acceptor. Richmond *v.* Heapy, 1 Stark. 202; Johnson *v.* Peck, 3 id. 66; Sparrow *v.* Chisman, 9 B. & C. 241. See further Longman *v.* Pole, 1 Moody & M. 223; and compare with Jones *v.* Yates, *supra;* Henderson *v.* Wild, 2 Camp. 561. See also Minor *v.* Gaw, 11 Smedes & M. 322; Brewster *v.* Mott, 4 Scam. 378; Purdy *v.* Powers, 6 Barr, 492. Though a discharge or release from a debt by one of several plaintiffs who are partners, is, even when fraudulently given, a good defence to the joint action, yet a receipt of payment, given by one of several plaintiffs, copartners, is nothing more, as evidence, than a *primâ facie* acknowledgment that the debt sued has been paid; and the plaintiffs may, notwithstanding, show the contrary. Skaife *v.* Jackson, 3 B. & C. 421; Farrar *v.* Hutchinson, 9 A. & E. 641; Opinion of Parke, B., in Wallace *v.* Kelsall, 3 B. & C. 273. See Sherwood *v.* Barton, 36 Barb. 284.

(*jj*) Folk *v.* Wilson, 21 Md. 538.

(*k*) Grant *v.* Hawkes, Chitty on Bills, 42; Heath *v.* Sansom, 2 B. & Ad. 291. In this last case, Sansom & Evans were partners under the firm of Sansom & Co. Sansom was also a partner in the Droitwitch Patent Salt Company; and, being indebted to them, drew a bill in the name of Sansom & Co., payable to the Salt Company. The latter indorsed the bill to the plaintiff, though not, as it appeared, for any valuable consideration. The plaintiff brought his action against Sansom & Evans. It was *held*, that the Droitwich Company could not have sued Evans on the note, it being given to them in fraud of Evans; and that, as it did not appear why the plaintiff sued the makers of the note, whom he did not know, rather than the indorsers, who were a solvent and well-known partnership, it was incumbent upon the plaintiff, under the circumstances, to show that he gave a valuable consideration for the indorsement to him. *Held*, also, Parke, J., *dissentiente*, that in all cases where, from defect of consideration, the original payees cannot recover on the note or bill, the indorsee, to maintain an action against the maker or acceptor, must prove consideration given by himself or a prior indorsee, though he may have had no notice that such proof will be called for. But where, in an action by indorsee against acceptors of a bill of exchange, some of the defendants pleaded that they did not accept, and it was proved that all the defendants were partners, and that one of them, who had suffered judgment by default, had accepted the bill in the name of the firm, in fraud of the partnership, and not for partnership pur-

*212 Nor would it be good in his * hands, whatever the consideration he gave, if he also was aware of the fraud by which his indorser obtained it. (*l*)

poses, it was *held*, that such proof, without evidence of knowledge on the part of the plaintiff, did not, *under the issue*, oblige the plaintiff to prove the circumstances under which the bill was indorsed to him. Musgrave *v.* Drake, 5 Q. B. 185. See Heywood *v.* Watson, 4 Bing. 496; and see the Mechanics' Bank *v.* Foster, 44 Barb. 87.

(*l*) If the partnership prove the note or bill upon which it is sued to have been issued or transferred in fraud of their rights, the burden is now upon the claimant, through the original wrongful holder, to show that he took it fairly, and not under circumstances which could reasonably operate as notice of the fraud. Munroe *v.* Cooper, 5 Pick. 412; Arden *v.* Sharpe, 2 Esp. 524. See Blair, Miller *v.* Douglass, cited in Collyer on Part. § 495. And in an action against one partner by the payee of a partnership note, the other partner is a competent witness for the defendant, to prove that the consideration of said note was for the witness's exclusive benefit, given to secure a debt due by him on his own account; and that when he signed the note he informed the plaintiff that he was not authorized to sign the defendant's name to it. Robertson *v.* Mills, 2 Harris & G. 98. But it is not necessary that *actual* bad faith should be fastened upon the second indorsee of a fraudulently circulated bill or note, to defeat his claim against the firm. It is sufficient if the circumstances under which he became such indorsee show that, but for his gross negligence, he would have learned the fraud in which the paper originated, or by which it had been transferred. N. Y. F. Ins. Co. *v.* Bennett, 5 Conn. 574; Smyth *v.* Strader, 4 How. 404. And, *it seems*, that if a note is offered at a bank, by one who became a party to it as intermediate indorser, to be discounted for the benefit of the offerer, the transaction on its face would import, that the last indorsement was intended merely to aid the negotiability of the paper, and would throw upon the bank, discounting the paper under such circumstances, the *onus* of showing the transaction to have been regular. Mauldin *v.* Branch Bank at Mobile, 2 Ala. 502. See Bank of Vergennes *v.* Cameron, 7 Barb. 143, 150; Cooper *v.* McClarkan, 22 Penn. St. 80. But if the holder of a partnership negotiable security, issued or negotiated through the fraud of one of the partners, show himself to be a *bonâ fide* indorsee for value, without notice of the fraud, the undoubted general rule is, that, in such hands, the paper is binding on the firm; and, as we have already seen, knowledge acquired by the holder subsequently to his taking the paper will not affect the *bona fides* of the transaction. Arden *v.* Sharpe, 2 Esp. 524; Wells *v.* Masterman, id. 731; Lacy *v.* Wolcott, 2 Dow. & R. 458; Sanderson *v.* Brooksbank, 4 Car. & P. 286; Usher *v.* Dauncey, 4 Camp. 97; Sutton *v.* Gregory, 2 Peake, 150; *Ex parte* Bushell, 8 Jur. 937; Bank of Kentucky *v.* Brooking, 2 Litt. 45; Livingston *v.* Roosevelt, 4 Johns. 279; Smith *v.* Lusher, 5 Cow. 689; Vallett *v.* Parker, 6 Wend. 619; Catskill Bank *v.* Stall, 15 id. 364, 18 id. 466; Vernon *v.* Manhattan Co., 17 id. 524, 22 id. 183; Evans *v.* Wells, id. 325, 333, 20 id. 251; North River Bank *v.* Aymar, 3 Hill, 262; Gildersleeve *v.* Mahony, 5 Duer, 383; Rich *v.* Davis, 4 Cal. 22; Le Roy *v.* Johnson, 2 Pet. 186; Emerson *v.* Harmon, 14 Me. 271; Waldo Bank *v.* Lumbert, 16 id. 416; Dudley *v.* Littlefield, 21 id. 418; Duncan *v.* Clark, 2 Rich. 587; Babcock *v.* Stone, 3 McLean, 172; Commercial Bank *v.* Lewis, 13 Smedes & M. 226; Freeman *v.* Ross, 15 Ga. 252; [Calkins *v.* Smith, 48 N. Y. 614.] Hence, equity will restrain by injunction the negotiation of a bill of exchange, though in the hands of a holder for value, if he took it knowing

* On the other hand, if paper be drawn or discounted * 213
or received, bearing only the signature of one partner, and the proceeds are directly carried to the partnership funds, the partnership cannot be charged; because it is considered that the credit is given on negotiable paper only to those whose name it bears. (*m*) But as between the partners it is a partnership note; and, if one partner pays it, he may charge it to the account of the firm. (*mm*) The strictness of the rule has been relaxed so far as to hold the firm liable, when, by proof of usage or otherwise, it was found that this was the way in which they signed their paper; for this, in fact, makes the partner's name the name of the firm, as to these transactions. (*n*) So, too, if a partner uses neither his own name nor that of the firm, but a fictitious one, and does this in partnership business and on partnership account, if his partnership can be shown

that it had been improperly accepted, by one of the partners, in the name of the partnership. Hood *v.* Aston, 1 Russ. 412. In general, however, the fact that one partner has given the partnership name on his own separate account is a matter of legal defence only, and equity cannot relieve unless defence at law be impracticable. Sneed *v.* Cogle, 4 Litt. 162.

To an action by indorsee against A. & B., as drawers of a bill of exchange, indorsed to C., and by him to the plaintiff, A. pleaded that he and B. were in copartnership as brewers; that B. made and indorsed the bill, using the name of the firm, in fraud of A., and not for the purposes of the copartnership, but for his own private purposes, namely, for a private debt due from him to C., and without the knowledge or consent of A.; that there was no consideration or value to him, A., for the drawing or indorsement of the bill: of all which premises, C., at the time of the indorsement to him, had knowledge and notice; and that at the time when the bill was indorsed and delivered to the plaintiff, he had full knowledge and notice of all the premises in the plea aforesaid. Replication, that, at the time when the bill was indorsed and delivered to the plaintiff, he had not any such knowledge or notice as in the plea mentioned; and issue thereon. At the trial, the jury found that C. had no knowledge of the original fraud in the drawing of the bill; but that the plaintiff, at the time of the indorsement to him, had knowledge of that fraud. *Held*, that the plea was not proved. May *v.* Chapman, 16 M. & W. 355.

(*m*) Farmers' Bank of Mo. *v.* Bayless, 35 Mo. 428, and same case, 41 Miss. 274; Emly *v.* Lye, 15 East, 7; Siffkin *v.* Walker, 2 Camp. 308; *Ex parte* Hunter, 1 Atk. 223; *Ex parte* Bolitho, Buck, 100; Denton *v.* Kodie, 3 Camp. 493; Bevan *v.* Lewis, 1 Sim. 376. See Loyd *v.* Freshfield, 2 Car. & P. 325; Graeff *v.* Hitchman, 5 Watts, 454; Jaques *v.* Marquand, 6 Cow. 497; Willis *v.* Hill, 2 Dev. & B. 231; Allen *v.* Coit, 6 Hill, 318; Rogers *v.* Coit, id. 322; Green *v.* Tanner, 8 Metc. 420.

(*mm*) Sprague *v.* Ainsworth, 40 Vt. 47.

(*n*) South Carolina Bank *v.* Case, 8 B. & C. 427. And see Hubbell *v.* Woolf, 15 Ind. 204; Schollenberger *v.* Seldonbridge, 49 Penn. 83.

to have authorized or to have adopted the act, they will be held as if this name were theirs. (*o*)

That one partner may sign a note so as to hold all jointly and himself severally, there can be no doubt. If A. makes a joint and several note, and signs it "A., B., & Co.," and also "A.," we cannot see why he is not so held. If there be no words making it joint and several, it is only the joint note of all which it is by the signature A., B., & Co.; and therefore the signature A. is surplusage and inoperative. But if the signature is A., B., & Co., by A., then it is certainly the
* 214 signature of the company by an agent, * who might be held severally, if want of authority or other circumstances made him so liable, but who is no more held in severalty because he is a partner than he would be if he were not. If the words were, "I promise," &c., it might tend to hold the signer severally, but would not, we think, be sufficient for this. (*p*)

(*o*) Williamson *v.* Johnson, 1 B. & C. 146.

(*p*) See Galway *v.* Matthew, 1 Camp. 403. This case *expressly* decides that on a note of the above description the whole firm are liable. But it is an *inference* only that in such a case the partner, signing his own and the firm's name, could be separately sued. This, however, *is* expressly decided in Hall *v.* Smith, 1 B. & C. 407. But Hall *v.* Smith has been overruled in the Exchequer, and cannot now be regarded as an authoritative decision. See *Ex parte* Buckley, 14 M. & W. 469. Parke, B.: "I really must say that I think Hall *v.* Smith cannot be supported." Alderson, B., concurred. Platt, B.: "I have no doubt that Hall *v.* Smith cannot be supported." Maclae *v.* Sutherland, 3 Ellis & B. 34, 35, 25 Eng. L. & Eq. 92, 110; Staats *v.* Howlett, 4 Denio, 559. Compare Owen *v.* Van Uster, 10 C. B. 319. See also *Ex parte* Christie, 8 Jur. 919. See also Wilks *v.* Back, 2 East, 142; Doty *v.* Bates, 11 Johns. 544. In this last case, a note made by one partner, and beginning, "I promise to pay," but signed with the name of the firm, was held binding on the partnership, as meaning, "*I, one of the partners, promise on behalf of the firm,*" &c. A note signed by one partner only, "for himself and partners," will satisfy the terms of an act of Parliament, which requires a writing to be signed "with his or their name or names," and will, therefore, be a valid note, and binding on the firm. Meux *v.* Humphrey, 8 T. R. 267. See Smith *v.* Bailey, 11 Mod. 401. And if in an action against the drawers of a bill, or the makers of a promissory note, the declaration states the defendants to have made the bill or note, "their own proper hands being thereunto subscribed," a bill or note subscribed with the partnership name of the defendants by one of them is sufficient to support such averment. Jones *v.* Mars, 2 Camp. 305; Porter *v.* Cumings, 7 Wend. 172. See Snow *v.* Howard, 35 Barb. 55. Whether it is within the general implied powers of one partner to bind his copartner in an obligation which shall make him severally liable to a creditor, so as to deprive such copartner of a defence in abatement for the nonjoinder of his codebtor as defendant, when prosecuted at law upon the obligation, is doubted by Wells, J., in Ganson *v.* Lathrop, 25 Barb. 455.

If there be two houses of the same name, entirely independent and disconnected in their business, no other difficulty can arise than what may occur when one man is charged as liable on paper which another man of the same name has made. It is a question of fact, and not of law. But if there be one person who is a partner in both of these houses, a new question arises. And it seems to be *held*, that a partner in one may be made liable on the paper of the other, unless he could show that the holder knew that the paper was that of the other exclusively: (*q*) as a general rule, it may be said that if two or more firms are connected in business, and use the same name, a holder of the paper having that name may * charge upon it either of the partnerships, at his * 215 own election; unless he knew, or ought to have known, definitively, that it belonged to one of them, and not to the other. But though he may thus elect to consider it as the paper of one or the other, he cannot treat it as the paper of both, unless their connection be such as to make them in fact but one firm. (*r*)

A joint and several note by all the members of a firm is not strictly a partnership note, nor has it the same effect; nor could the holder, in case of insolvency, claim from the partnership funds; and, if it be signed by some of the partners only, it will have no operation against those not signing it. (*s*)

If a partnership be contemplated and agreed upon, and a purchase is made or a debt otherwise incurred by one of the partners for the partnership, but before the actual formation of the partnership, it is only the debt of that partner; but this indebtedness is a sufficient consideration to sustain the subsequent promise of the partnership when formed, given in lieu of it or to secure it. (*t*)

There are some acts in relation to negotiable paper which carry with them the presumption that the partner doing them

(*q*) Baker *v.* Charlton, 1 Peake, 80.

(*r*) M'Nair *v.* Fleming, cited in Mont. on Part. 37. See also 3 Dow, 229; Miller *v.* Consolidation Bank, 48 Penn. 514.

(*s*) Perring *v.* Hone, 4 Bing. 28; Crouch *v.* Bowman, 3 Humph. 209. See Norton *v.* Seymour, 3 C. B. 792; Kendrick *v.* Tarbell, 27 Vt. 512; *In re* Warren, Daveis, 320; Filley *v.* Phelps, 18 Conn. 294; De Jarnette *v.* McQueen, 31 Ala. 230; *ante*, p. * 126, note (*i*).

(*t*) Saville *v.* Robertson, 4 T. R. 720; see, for statement of the case, *ante*, p. * 105, note (*g*); p. * 114, note (*w*).

was not authorized. One of these is the indorsing of paper which does not belong to the firm. This is, in fact, lending or giving the credit of the firm. There can be no doubt that this is frequently done by mercantile firms. Sometimes they lend their credit, and are paid for it by a compensation for the guaranty. Sometimes they reciprocate accommodation paper with another firm, each indorsing for the benefit of the other; and the notes are of the same amount, or equalized in some way, and perhaps made for some broken amount, to give them the appearance of business paper. Of course, a partnership is liable where it authorizes any such use of its name. But this is no part of general and regular mercantile business, and therefore the presumption of the law is rather against the author-

* 216 ity of the partner who so signs the * name. (*u*) But this presumption may be overcome not only by direct evidence of authority, but from usage or frequent recognition of such signature, or such other similar facts as would satisfy a jury that the signature was for the partnership and by its authority. (*v*)

(*u*) The principle is clearly stated by Walworth, Chancellor, in Stall *v.* Catskill Bank, 18 Wend. 466, 477. See also Bank of Tennessee *v.* Saffarrans, 3 Humph. 597. New York F. Ins. Co. *v.* Bennett, 5 Conn. 574; Mauldin *v.* Branch Bank at Mobile, 2 Ala. 502; Lang *v.* Waring, 17 Ala. 145; Gansevoort *v.* Williams, 14 Wend. 133, 139; Williams *v.* Walbridge, 3 id. 415; Austin *v.* Vandermark, 4 Hill, 261; Bank of Vergennes *v.* Cameron, 7 Barb. 143, 150. But this presumption does not arise where accommodation paper, executed by one partner in the name of the firm, is in reality for the benefit of the partnership, rather than for that of him to whom it is given. As where a bill, drawn by one partner upon the firm, and accepted by him in the firm's name, for the accommodation of the payee, is given in exchange for the paper of the latter to be used in raising money for the purposes of the partnership. Gano *v.* Samuel, 14 Ohio, 592.

(*v*) Bank of Tennessee *v.* Saffarrans, 3 Humph. 597; Whaley *v.* Moody, 2 id. 495; Gansevoort *v.* Williams, 14 Wend. 133, 139; Chenowith *v.* Chamberlin, 6 B. Mon. 60; Sweetser *v.* French, 2 Cush. 309; Bank of Kentucky *v.* Brooking, 2 Litt. 41, 45; Darling *v.* March, 22 Me. 184, 188; Tanner *v.* Hall, 1 Barr, 417; Dundass *v.* Gallagher, 4 id. 205. But, though it appear that each of two partners have repeatedly, with the knowledge and assent of the other, *indorsed* accommodation notes in the firm name, this is not sufficient evidence that either of them is authorized to sign the firm name to such paper as *maker and surety*. Early *v.* Reed, 6 Hill, 12. Paper, however, to which the partnership name has been affixed by one partner by way of accommodation, is always binding upon the firm, in the hands of a *bonâ fide* holder for value, taking it without notice of the circumstances, express or implied. Id.; Catskill Bank *v.* Stall, 15 Wend. 364; Austin *v.* Vandermark, 4 Hill, 259; Gano *v.* Samuel, 14 Ohio, 592; Waldo Bank *v.* Lumbert, 16 Me. 416; Mauldin *v.* Branch Bank at Mobile, 2 Ala. 503, 513; Beach *v.* State Bank, 2 Cart. (Ind.) 488.

It is also a general rule, that no partner has any authority implied from the mere fact of partnership to become surety for any debt in any way, and bind the partnership thereto. (*w*) The reason from which this rule originated, is, that the proper business of a partnership is most usually buying and selling; and therefore there is seldom a presumption that any thing but this is within their business. And the same rule applies, for the same reason, to guaranties given by one partner in the name of the * firm. But the question is always open * 217 to evidence; and the holder of the guaranty may show not only the peculiar usage of that firm, or their frequent recognition of such guaranties, (*x*) but also that the nature of their business is such as to make this giving of guaranties a part of it. So Lord Mansfield said in relation to bankers; (*y*)

(*w*) Foot *v.* Sabin, 19 Johns. 154; Laverty *v.* Burr, 1 Wend. 531; N. Y. F. Ins. Co. *v.* Bennett, 5 Conn. 574, 580; Andrews *v.* Planters' Bank, 7 Smedes & M. 192; Langan *v.* Hewett, 13 id. 122; Wagnon *v.* Clay, 1 A. K. Marsh. 257; Rollins *v.* Stevens, 31 Me. 454; New York F. Ins. Co. *v.* Bennett, 5 Conn. 583; Butler *v.* Stocking, 4 Selden, 408. See farther, for the general principle, Sweetser *v.* French, 2 Cush. 309, 314; Rolston *v.* Click, 1 Stewart, 526; Kibbler *v.* De Forest, 6 Ala. 92; Bank of Rochester *v.* Bowen, 7 Wend. 158; Long *v.* Carter, 3 Ired. 238. [The ratification by a firm of the unauthorized act of one partner, in signing the firm name to a contract of suretyship, is ineffectual as against existing partnership creditors, being in substance an adoption by the firm of a private debt of one partner. Kidder *v.* Page & tr., 48 N. H. 380.]

(*x*) And a recognition and adoption, express or implied, subsequent to the giving of the guaranty, may be given in evidence as well as a prior authority; and either the one or the other may be shown by parol as well as by a written document. Duncan *v.* Lowndes, 3 Camp. 478; *Ex parte* Nolte, 2 Glyn & J. 305, 306; Crawford *v.* Sterling, 4 Esp. 207; Halseham *v.* Young, 5 Q. B. 833; Long *v.* Carter, 3 Ired. 241; Mayberry *v.* Bainton, 2 Harris, 24. See Coursey *v.* Baker, 7 Harris & J. 28. In Sweetser *v.* French, 2 Cush. 309, 314, Metcalf, J., states very clearly the law respecting guaranties as established both in England and this country. See also Hamill *v.* Purvis, 2 Penn. 177; Sutton *v.* Irwine, 12 S. & R. 13. Partners may give in evidence a disclaimer of a guaranty, and a refusal to be concerned in it. —— *v.* Layfield, 1 Salk. 292. And whether a guaranty has been given by one partner with the privity and consent of all, is a question for the jury. Payne *v.* Ives, 3 Dow. & R. 664.

(*y*) Hope *v.* Cust, 1 East, 53. If a guaranty given by one partner can be considered as an assurance or representation made in the usual course of, and with reference to, the business of the firm, it will be binding on the partnership, as being an act entirely within the scope of one partner's authority. See Crawford *v.* Sterling, 4 Esp. 209; Sutton *v.* Irwine, 12 S. & R. 13. But one partner will not be deemed to have the power of giving a guaranty in the name of the firm, merely in consequence of its being a *reasonable* mode of carrying into effect an acknowledged partnership contract. Brettel *v.* Williams, 4 Exch. 623.

and it has been *held*, that in horse-dealing it is so customary to sell with warranty, or rather so rare to sell without it, that a buyer may presume that a partner (or any agent) having authority to sell has thereby authority to warrant. (*z*) The power or authority to sell generally does not carry with it the power to warrant; but we should be disposed to hold that a warranty by any partner, of the property of the firm lawfully sold by him, would hold the firm, if made and received in good faith. (*a*)

SECTION V.

OF THE POWER OF A MAJORITY OF THE PARTNERS.

Whether a majority in numbers of the partners can lawfully control the rest, and conduct the affairs of the partnership at their own pleasure, has been much discussed. At one time there was certainly a strong tendency to sustain this power, and to extend it over all the affairs of the partnership, provided only that it was exercised honestly and deliberately, and with every reasonable opportunity to the minority to make their wishes and the reasons for their wishes known and duly considered. It has, as certainly, been the tendency of the courts in later years to limit this power narrowly, and almost confine it within what may be called the domestic acts of the firm; as, for example, the appointment or salary of a clerk, the arrangements of the counting-room, method of conducting sales, or

(*z*) "A case may be put, where two persons in partnership, for the sale of horses, should agree between themselves never to warrant any horse; yet, though this be their course of business, there is no doubt that if, upon the sale of a horse, the property of the partnership, one of them should give a warranty, the other would be thereby bound." Per Abbott, C. J., in Sandilands *v.* Marsh, 2 B. & Ald. 679. See Penn *v.* Harrison, 3 T. R. 760.

(*a*) In Sweet *v.* Bradley, 24 Barb. 549, the defendant, a member of the firm of B. Bradley & Co., sold some promissory notes belonging to the firm, received the proceeds, and applied them to the use of the firm. At the sale, he assured the purchaser of the paper that he would warrant that the notes were given in the regular course of business, and would be paid; that the makers and indorsers were responsible and men of abundant means. The notes having been bought upon the strength of these and other similar representations, which proved to be false, it was *held* that the firm was bound by the representations of the partner who sold the notes; and that an action would lie against all the members of the firm, upon the warranty.

keeping accounts, and the like. And, even as to these, it is put upon the apparent necessity of deciding as to how that shall be done which must be done in some way. Whereas, if the partnership cannot agree about a purchase, or a sale, it may be omitted, and the business nevertheless go on. Recent American decisions appear to enlarge this power somewhat. Thus, it has been held that a majority of a firm established to publish a newspaper has authority to appoint or remove a publisher. (*aa*) It will be apparent, however, from the authorities presented in our note, that the law as to the power and authority of a majority of copartners cannot be considered as definitively established. (*b*)

(*aa*) Peacock *v.* Cummings, 46 Penn. St. 434. [But see Yeager *v.* Wallace, 57 Penn. St. 365.]

(*b*) Chitty says (3 Laws of Commerce, 236) that, in the absence of express stipulations between the partners, "a majority must decide as to the disposal of the partnership property; or, if no majority can be obtained to decide as to such disposal, or there are but two partners in the firm, one or more partners may manage the concern as they think fit; provided it be within the rules of good faith, and warranted by the circumstances of the case." To this Collyer adds (Collyer on Part. § 197): "It will be observed that this opinion is given with considerable caution, and perhaps it may be laid down that, in a partnership without articles, the power of the majority to bind the minority is confined to the ordinary transactions of the partnership." The English authorities on the point are few, and by no means conclusive. In Robinson *v.* Thompson, 1 Vern. 465, it was *held*, that an account of the profits of a voyage settled by the major part of the part-owners should conclude the rest. And in Falkland *v.* Cheney, 5 Bro. P. C. 476, 1 Bro. P. C. (Dublin ed.) 90, it seems to have been laid down as a general principle that, in all sea adventures, the act of a majority binds the whole. But in that case such power was given to the majority by the articles of association. See Lloyd *v.* Loaring, 6 Ves. 777. Perhaps the weightiest authority to be found in the English books is the *dictum* of Lord Eldon in Const *v.* Harris, Turner & R. 516, 525. After declaring that the act of the majority of the partners is to be considered the act of all, he adds: "I call that the act of all, which is the act of the majority, provided all are consulted, and the majority are acting *bonâ fide;* meeting, not for the purpose of negativing what any one may have to offer, but for the purpose of negativing what, when they are met together, they may, after due consideration, think proper to negative. For a majority of partners to say, 'We do not care what one partner may say: we, being the majority, will do what we please,' is, I apprehend, what this court will not allow. In all partnerships, whether it is expressed in the deed or not, the partners are bound to be true and faithful to each other: they are to act upon the joint opinion of all, and the discretion and judgment of any one cannot be excluded; what weight is to be given to it is another question."

The American authorities are not much more numerous nor satisfactory. The opinion of the court in Kirk *v.* Hodgson, 3 Johns. Ch. 400, contains expressions which, considered by themselves, would appear to give unqualified support to the above *dicta* of Lord

*219 * We may consider this question in reference to third persons, and also in reference to the partners themselves. If the majority propose to deal with a customer, either in the way of purchase or sale, in a manner to which the minority do not assent, it is certain that the minority, whether they withhold authority or not, will be bound, if they do not communicate their dissent to the customer, provided the transaction be within the scope of the partnership business; for so *220 would the majority be bound if the minority so * did it, and so would all the partners be bound if any one of them so did it. On the other hand, if it be not within the business of the firm, neither a majority nor a minority would be bound to third persons, unless these persons could show themselves to have believed and to have been authorized to believe that it was within the business of the firm, or that the firm had made it theirs by adoption or ratification.

All that we have said results necessarily from principles which have been fully considered in former chapters. Let us here suppose that the question refers to some single act. The majority of a house dealing in cotton wish to sell one hundred bales at a certain price, and the minority refuse to consent;

Eldon. But Chancellor Kent, who rendered the decision in that case, says of it, in his Commentaries, that it "related only to the case of the management of the interior concerns of the partners among themselves; and to that it is to be confined." 3 Kent Comm. [45]. We have, however, two recent cases in which the doctrine is asserted, that where a firm, without articles, consists of more than two members, any contract within the sphere of the joint business, made in good faith by the majority, will be binding on the whole, notwithstanding at the time of, or previous to, the making of the agreement, the minority expressly dissent, and communicate their dissent to the third party with whom it is made. See Johnston *v.* Dutton, 27 Ala. 245; [Campbell *v.* Bowen, 49 Ga. 417.] See also Western Stage Co. *v.* Walker, 2 Iowa, 504; Irvine *v.* Forbes, 11 Barb. 587; Kirk *v.* Hodgsdon, 3 Johns. Ch. 400. E., K., & D., in trade, employed H. as their clerk, at a fixed annual salary, but with the understanding that the salary should be increased with the increase of the firm business and of H.'s duties. In the third year, it was discovered that H. had overdrawn money of the firm and applied it to his own use; and this breach of trust was confessed by him. Nevertheless, a majority of the firm, E. & D., continued H. afterwards in his employment. It was *held*, that this fact was decisive in favor of the continuance of the rights of H. and of his claim to the stipulated increase of salary; that it was evidence that he had not forfeited the confidence of the firm, and that the overdrawings, charged and confessed, were not understood by them to be acts of intentional fraud; and that they could not, therefore, be set up by the firm against his claim, founded on their promises and acknowledgments, and his services. [But see *ante*, p. *95 and notes.]

the majority make the sale, deliver the cotton, and take notes or money for it; can the buyer hold this cotton by good title? Certainly, if the minority express no dissent; but, if they do express dissent and positive prohibition, is the transaction then valid? It might not be easy to reach the question at law. The minority alone, that is, without the majority, would find it difficult to maintain replevin or trover, or any other action, for the cotton or its value. And it would not seem, commonly at least, to be a case in which a court would permit a minority to use the names of the majority as coplaintiffs against their will. If the minority sold the same cotton to another customer, and let the two purchasers contest the title of each other, the purchaser from the minority alone would certainly have no better title than the purchaser from the majority alone. If the question were considered in equity, all the circumstances of the case would be duly regarded, and, among others, the right or absence of right of the minority to dissolve the partnership at will. (*c*) For, if they have this right, it would seem that
* they could exercise it, in case of irreconcilable and *221
material difference of view or purpose. And, if they did
not exercise it, they might be considered as yielding to the majority, for the sake of preserving the partnership, and so adopting the transaction. If they could not dissolve it, because it was established for a time certain, and if the conduct of the majority was unreasonable and oppressive, this would be a good ground for the other partners asking of the court a dissolution of the partnership; and generally, if they did not, it would,

(*c*) In both the cases, Johnston *v.* Dutton, 27 Ala. 245, and Western Stage Co. *v.* Walker, 2 Iowa, 504, cited in preceding note, the partnership was, by articles, to continue for a time certain, and in both the actions were at law. In Johnston *v.* Dutton, the attention of the court seems to have been called to views similar to those represented in the text. See argument of counsel, p. 250, 251. The court, however, said, p. 253: "We do not consider the cases to which we have been referred, holding that one partner has the right, at pleasure, to dissolve a partnership, although the articles provide that it is to continue for a specified term, as having any bearing on the case under consideration. Conceding they are law, which is doubtful, the decisions rest solely upon the ground, that the limitation of the right of dissolution is incompatible with the nature of the partnership contract; and this principle does not militate against the positions we have asserted. The dissent, in the present case, cannot be regarded as a dissolution; for, if effectual, it would not, necessarily, produce that result, although it might operate to change the mode of conducting the business. In other words, it might be carried on without contracting debts."

we think, be taken as before, that by not dissolving the partnership they acceded to the wishes of the majority. But there certainly might be cases in which the act of the majority would be injurious to the minority, and an immediate dissolution even more so, and the majority would be deemed to have no right to inflict upon a minority either of these mischiefs. Then the court would decree such annulling of the act, or compensation, or other remedy, as justice between all the parties and the power of the court should authorize and require. But these considerations touch rather the rights and interests of the partners. So far as the customer, the third party, is concerned, — always supposing the transaction honest as to him, — we should say that the question of the power of a majority would be put aside both in law and in equity by the general rule, that, if the transaction were within the business of the firm, it bound all the partners who gave no notice to the third party; and, on the other hand, that it did not bind recusant and protesting partners who gave sufficient notice of their dissent; (*d*) and that, if it was without the business of the partnership, it bound nobody but those who authorized the act or ratified it.

If the question of a majority related only to those things to which no person out of the partnership was privy, it would assume a somewhat different aspect. Suppose, for example, a majority chose to enlarge or vary the business importantly, or enter upon a new business, which things no partner can do by his implied authority, can the majority compel the mi-
* 222 nority to acquiesce in * this? We should say that they certainly could not. (*e*) And yet it must generally be the case, that if the majority persisted, and the minority did

(*d*) See *ante*, p. * 218, note (*b*).

(*e*) Natusch *v.* Irving, Gow on Part. App. p. 398; *ante*, p. * 198, note (*x*). See Const *v.* Harris, Turn. & R. 524; Livingston *v.* Lynch, 4 Johns. Ch. 573. In Abbott *v.* Johnson, 32 N. H. 9, it appeared that a number of persons, among them the plaintiffs, formed a written agreement of copartnership, for the purpose of carrying on a retail trade in domestic and foreign goods. By one of the articles it was provided that there should be "neither purchase nor sale of ardent spirits by the concern." The articles were afterwards altered by the company so as to allow a trade in ardent spirits to be carried on. The court said: "We can have no hesitation in *holding*, that this was such a substantial alteration as discharged the plaintiffs from their obligation to proceed with the partnership, unless they agreed to the change, and that it gave them the right to retire from the firm, . . . if they did it under circumstances which were such as to do no injury to the partners who chose to go on under the new arrangement."

not dissolve the partnership or seek relief from a court of equity, but did go on with the business in the manner proposed by the majority, this would be deemed evidence of their consent. Still, the universal principle would apply, that waiver or consent are implied by acquiescence only when that acquiescence is free and voluntary; and therefore this evidence, or presumption, might be rebutted by showing that circumstances had placed the minority so far in the power of the majority that they must go on and submit for a time, reserving all their rights of dissent, or suffer important injury, and then their so going on would not be held as necessarily implying a waiver or loss of any right. These views are, to some extent, only theoretic; and it is perhaps a little remarkable that cases of conflict of interest or wishes between partners have not been before the courts of England or this country often enough to settle the question by adjudication as to the power of a majority.

SECTION VI.

OF THE CONDUCT WHICH PARTNERS MAY REQUIRE OF EACH OTHER.

1. *Of Good Faith.*

The first and highest duty which partners owe to each other, is that of perfect good faith. (*ee*) In the Roman civil law, the "societas" * of merchants for trade, and of *223 husband and wife, were considered closely analogous, and in many respects governed by the same principles. (*f*) Indeed, what we have already said indicates sufficiently how much partners are in the power or at the mercy of each other, and there certainly seems to be no relation in life, calling, either by its own exigencies or by the rules of law, for a more absolute good faith than the relation of partnership. (*g*)

After this comes the duty of having and using the skill and

(*ee*) See Nicholson *v.* Janeway, 1 Green (N. J.), 285.

(*f*) Vin. Comm. lib. 3, tit. 26, § 2; Pothier, Contr. de Soc. ch. 3.

(*g*) Baker *v.* Charlton, 1 Peake, 80. See England *v.* Carling, 8 Beav. 129, for an example of bad faith between partners, and of the displeasure with which it is viewed by the court. See also Blissett *v.* Daniel, 11 Hare, 493, 25 Eng. L. & Eq. 105; Ault *v.* Goodrich, 4 Russ. 430. In some cases, however, the same strict good faith does not seem to be required between partners as is imperative upon those who occupy the position of fiduciary relations. Wheeler *v.* Sage, 1 Wallace, U. S. S. C. 518. In some cases, partnership is fiduciary. Brooks *v.* Martin, 2 id. 70.

knowledge which the partnership requires; of applying to all its affairs due care; of devoting to them a reasonable measure of time and labor; and of conducting all its concerns, private or public, with due economy. For the breach of any one of these duties, the party is held responsible. (*h*) A court of equity, in particular, will always decree such compensation, in form or kind and amount, as shall be needed to make good any losses arising from any violation or disregard of these duties. (*i*)

The rule would extend, by the reason of it, to the manner of doing any thing. Hence, as no partner should do that which he has no lawful power to do, so he should do every thing he has power to do either by the general law of partnership or by special stipulation in the articles, — as, for example, the assigning of his share, or the giving of partnership security, — in such a way as a due regard for the interests of the partnership would require. (*j*)

As every partner is under an obligation to do what he can to promote the prosperity of the partnership, no partner can charge the firm or his copartner for the extra value of his services over those of his partner, without a specific agreement. (*jj*)

In every bargain which he makes, he must remember a principle laid down emphatically by Lord Eldon, — that it is his duty to use the property for their benefit whose prop-
* 224 erty it is; (*k*) that is, for *the benefit of the whole as

(*h*) See *post*, p. *236, as to how far a partner may engage in other business, beside that of the firm; *post*, note (*r*). See the remarks of Redfield, C. J., in Pierce *v.* Daniels, 24 Vt. 624.

(*i*) See *post*, ch. 8, §§ 3, 4, respecting the remedies between partners which courts of equity administer. See Lefever *v.* Underwood, 41 Penn. 505. [If a partner neglects to render the personal services which he ought to render, he will be charged with their value in settlement of the partnership account. Marsh's Appeal, 69 Penn. St. 30.]

(*j*) The rule that each partner must do all he can for the benefit of his firm has, of course, its limitation in the reason of the thing and the circumstances of each particular case. See Rowe *v.* Wood, 2 Jac. & W. 556.

(*jj*) Bennett *v.* Russell, 34 Mo. 524.

(*k*) Crawshay *v.* Collins, 15 Ves. 226; Honore *v.* Colmesnil, 1 J. J. Marsh. 507, 541. Hence, when all the proprietors of a morning paper, save one, were also the owners of an evening paper, published in the same place, an injunction was granted to restrain the proprietors of the evening paper from publishing therein any information obtained at the expense of the morning paper, until it should first have been published in the morning paper. Glassington *v.* Thwaites, 1 Sim. & S. 124, 133. And if a copartnership own a dwelling-house which is occupied exclusively by the family of one of the partners, this partner is liable for rent to the firm, though there be no special agreement to that effect. Holden *v.* Peace, 4 Ired. Eq. 223. The

one concern, or one body, for so it is owned. So if a partner by any means gets possession of a fund properly belonging to the firm, he must share any profit or advantage arising from it, with his copartners. (*kk*)

If losses occur by reason of a breach of duty by a partner, in any way whatever, whether through fraud, negligence, ignorance, or extravagance, and whether by design or not, they must rest on the partner whose faulty conduct has caused them; and he cannot require the partnership to contribute in any way towards them. (*l*) But a partner is not liable to his copartners for a loss caused by an honest mistake of judgment, unless it amounts to gross negligence or ignorance. (*ll*)

The question may occur whether a negligence and consequent loss, in one respect, would be made up, or excused, by great successes and profit in another. It would perhaps be impossible to frame a definite rule which would govern all cases of this kind. The general principle would be something like this: If it were one transaction, quite indivisible, and the partner conducted it in some respects with a want of attention, which caused some loss, and in others with unusual care and

case of Beecher *v.* Guilbane, Mosley, 3, is thus reported: "If one copartner borrows money of the other on his note, he shall pay interest for it, though he had more money in the stock than what he borrowed; for the stock is only to be employed in augmentation of the trade, for their mutual benefit; but neither of them can make use of it for their own private advantage." See Kelley *v.* Greenleaf, 3 Story, 93; Roberts *v.* Totten, 8 Eng. 609; Pierce *v.* Daniels, 25 Vt. 624.

If one partner employ partnership funds in a private trade or adventure, he must account not only for the interest on the funds thus withdrawn from the partnership, but also for the profits of such separate trade. Brown *v.* Litton, 1 P. Wms. 140; Crawshay *v.* Collins, 15 Ves. 218; Stoughton *v.* Lynch, 1 Johns. Ch. 467; Solomon *v.* Solomon, 2 Kelly, 18. And if such acts of one partner threaten the destruction of the joint property, or render it probable that the solvency of the firm and the rights of the creditors depend upon the interference of chancery, equity may interpose by injunction, even though a dissolution of the firm be not prayed for. Miles *v.* Thomas, 9 Sim. 607; Gratz *v.* Bayard, 11 S. & R. 41, 48. The same principles as to the use of the joint property apply to partners who wind up the affairs of the partnership after dissolution. See *post*, ch. 12, 13, upon the dissolution of a partnership and its effects.

(*kk*) Eason *v.* Cherry, 6 Jones, Eq. 261.

(*l*) Devall *v.* Burbridge, 6 Watts & S. 529; Jessup *v.* Cook, 1 Halst. 434. See M'Ilreath *v.* Margetson, 4 Doug. 278; *In re* Webb, 2 J. B. Moore, 500; Lyles *v.* Styles, 2 Wash. C. C. 224. See Beste *v.* His Creditors, 15 La. Ann. 55.

(*ll*) Morris *v.* Allen, 1 McCarter, 44; and see Stephens *v.* Orman, 10 Fla. 9.

skill and energy, which increased the profits, it could
* 225 not be deemed on the whole a case of * wrong demanding compensation. If, however, he had conducted throughout as he should have done, excepting in one or two particulars, and his default in these caused material injury, he should not be held excused for thus lessening the profits of the firm by the fact that they were still, on the whole transaction, very considerable. For the partnership is entitled to all its profits, and may ask compensation of any one whose wrongful act takes them or a part of them away, whether he be a partner or not, and whether much or little be left. And if there be many transactions, or one business divisible into many transactions, that he did his duty for the most part would certainly be neither excuse nor compensation for not doing it at all times. And we should doubt whether equity would find it easy to regard him as protected against all claims for default or violation of duty, because in certain things he did more than his duty. (*m*)

From the requirement of perfectly good faith, it follows that no partner must deceive his copartners, for his benefit and their injury, either by false representations or by concealments. Thus, if he persuades them into any course of business, or to any single transaction, by these means, and losses occur, he must sustain them or compensate for them. So, if he proposes to buy of them the whole or any part of their share of their business, and by any false statement or intimation on his part, or any concealment or prevarication, influences them to enter into an arrangement to effect his wishes, it will not be obligatory on them. (*n*)

If he makes any private bargain with third parties for his own benefit, which either inflicts a loss upon the partnership, or turns to himself advantages which belong to all in common, he will be held to make compensation for this, or to restore these advantages to the partnership in some way. (*o*) Thus,

(*m*) See Pothier, Contr. de Soc., n. 125.

(*n*) Maddeford *v.* Austwick, 1 Sim. 89, is a leading case. The same principles are asserted and maintained in the cases of Sexton *v.* Sexton, 9 Gratt. 204, and Hopkins *v.* Watt, 13 Ill. 298; Knight *v.* Marjoribanks, 11 Beav. 322, 2 Macn. & G. 10.

(*o*) Fawcett *v.* Whitehouse, 1 Russ. & M. 132, 135, 141, 148; Hichens *v.* Congreve, 1 Russ. & M. 132, 150, note (*b*), 4 Russ. 562; also, Carter *v.* Horne, 1 Eq. Ca. Abr. "Account," A., pl. 13; Russell *v.* Austwick, 1 Sim. 52.

if the partnership have a valuable leasehold property, and, when it is about to expire, a partner privately gets a renewal of it to himself, he cannot take *advantage of this to impose hard terms on his partners, but will be held to have obtained it for them as well as for himself. (*p*) *226

So, if he obtains goods for the partnership by barter of his own goods, he cannot charge an extra price for his goods. If he is properly carrying on a separate business, he may charge a fair living price; so perhaps he may if he has them on hand in any way. But if he purchased them for this bargain with the partnership funds or credit, or if he for the partnership might have bought in the same way, he will be allowed to put upon them only the price he paid. (*q*) So if he acts in buying for his firm a particular kind of goods which he also buys and sells on his own account, the firm are entitled to any profit he may make on his own goods sold to the firm. (*r*) And if, on

(*p*) Featherstonaugh *v.* Fenwick, 17 Ves. 298, 310; Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 68, 69; Leach *v.* Leach, 18 Pick. 68, 76; Anderson *v.* Lemon, 4 Seld. 236, 4 Sandf. 552. In Featherstonaugh *v.* Fenwick, *supra*, the Master of the Rolls said: "It is clear that one partner cannot treat privately, and behind the backs of his copartners, for a lease of the premises, where the joint trade is carried on, for his own individual benefit. If he does so treat, and obtains a lease in his own name, it is a trust for the partnership; and this renewal must be held to have been so obtained." [The renewal, during a copartnership, of a lease held by a firm, and rendered more valuable by the business of the firm, though made by one partner to himself, and though it would not have been made to the firm, inures to the benefit of the firm. Mitchell *v.* Reed, 61 N. Y. 123; Struthers *v.* Pearce, 51 N. Y. 357.]

(*q*) Burton *v.* Wookey, 6 Madd. 367. The plaintiff and defendant entered into partnership together to deal in *lapis calaminaris*. The defendant, who was a shopkeeper, was to take the active part in the concern, and to purchase the article from the miners in whose neighborhood he lived. After some time, the defendant adopted a course of dealing, by which, in place of paying the miners for the article with money, he paid them with shop-goods; and in his account with the plaintiff he charged him as for cash paid, to the amount of the price of the goods.

The question was, whether he could justify this charge, or whether he must not divide the profit made by him on the sale of the goods with the plaintiff.

The Vice-Chancellor said: "I must decree an account of the profit made by the defendant in his barter of goods, and must declare that the plaintiff is entitled to an equal division of that profit with the defendant."

(*r*) Bentley *v.* Craven, 18 Beav. 75. In this case the firm carried on the business of sugar-refiners. One of the members was a wholesale grocer, who had great knowledge of the proper time for buying sugars, and who, therefore, was selected as the buying agent of the firm. He bought sugars on his own account, in anticipation that the firm would need them; and, when they were required, sold them to the firm at the then market price.

the other hand, a partner gives the goods of the partnership in barter for something he buys, or otherwise uses them for his own benefit, he must allow the partnership the full market-price for them, or what any customer would have paid, unless the usage of the firm or their stipulations permit him to make his personal profit out of them.

2. *How far a Partner may transact Independent Business.*

* 227 * It is quite well settled that a partner has no right to carry away his knowledge, his skill, his capital or credit, his care or labor, into another business, whether only his own or that of another firm, to the injury of his first copartners. That is, he may not do this in such a way as to deprive them of business, of profits or advantages, which they had a right to expect from their connection with him. (*s*) As there is in practice no such thing as a universal partnership, so no partner is obliged, by the mere fact of partnership, to do nothing else than the business of the partnership. It is probably not

Held, that the firm was entitled to any profit he might have made. [But when a partnership is entered into for the purpose of transacting a commission business, — one to furnish buildings and fixtures, and the other to keep the books and give his personal attention to the management of the business, — the latter may, after the houses furnished by the former are full, and the former refuses to furnish further warehouse-room, put up other warehouses, and extend the business, to his own exclusive profit, provided he does not neglect the business of the firm. Parnell *v.* Robinson, Sup. Ct. Ga. 1877, 4 L. & Eq. Reptr. 13.]

(*s*) See Boulay Paty, Cours de Droit, Com. tom. ii. 94. Sir John Leach said, in Glassington *v.* Thwaites, 1 Sim. & S. 131, 133, "The principles of courts of equity would not permit that parties bound to each other by express or implied contract, to promote an undertaking for the common benefit, should any of them engage in another concern, which necessarily gave them a direct interest adverse to that undertaking." In Long *v.* Majestre, 1 Johns. Ch. 305, A. & B. carried on trade as partners, the capital being supplied by A. B. without the consent of A., and without rendering any account or dissolving the partnership, formed a new partnership with C., and carried into that house all the funds of the original firm, and used them therein till his death. The plaintiff filed his bill against the administratrix of B., and against C., his surviving partner, claiming to be entitled to the whole share of the deceased in the last partnership, alleging that a great part of the personal estate of the deceased had come into the hands of C.; and praying that C. might be compelled to set forth a full and true account of the joint transactions between him and the deceased, and of the personal estate of the latter in his hands. C. demurring to so much of the bill as called for the discovery and account above stated, the demurrer was overruled. And see Law *v.* Cross, 1 Black (U. S.), 533; Soules *v.* Burton, 36 Vt. 652.

true in fact that the majority of partners confine themselves absolutely and exclusively to partnership business, or that it is expected or necessary that they should. (*t*) And it may be very difficult for a court to distinguish between the case of an honest several business, taking only its due share of time, capital, care, &c., and an instance of unlawful withdrawing from a partnership of what belongs to the firm. But the line must be drawn somewhere; and courts have sometimes applied the rule with so much severity as to avoid transactions or compel compensation where the partner could not be charged with any thing more than exposing himself to a bias in his own favor and prejudicial to the partnership. (*u*)

3. *How the Accounts of the Firm should be kept.*

*As all partners have these rights as against each other, so they have the right which these rights imply, — that of enforcing and protecting these rights; and especially of knowing whether they are invaded or not. Therefore, each partner has a perfect right to know all that is done, and examine all the accounts at his own pleasure. (*v*) So every partner is bound to enter upon the proper books and in the proper way, or enable the clerk or other person employed to make due entry of, every charge and every credit, all money paid or *228

(*t*) See remarks of Willard, Vice-Chancellor, in Caldwell *v.* Lieber, 7 Paige, 483, 494, 495; Ship "Potomac," 2 Black (U. S.), 481.

(*u*) Burton *v.* Wookey, 6 Madd. 367; *ante*, p. *226, note (*q*). Sir John Leach there said: "It is a maxim of courts of equity that a person who stands in a relation of trust or confidence to another, shall not be permitted, in pursuit of his private advantage, to place himself in a situation which gives him a bias against the due discharge of that trust or confidence." But the mere fact that partners are so situated as to be under a temptation to improperly use the partnership property is not sufficient to induce equity to interfere by injunction. See Glassington *v.* Thwaites, 1 Sim. & S. 124.

The considerations applicable to the case of surviving partners, who are appointed executors of deceased copartners, will be suggested hereafter. *Post*, ch. 13, § 4, subsection 4.

(*v*) Rowe *v.* Wood, 2 Jac. & W. 558. It is the duty of each partner to keep precise accounts, and to have them always ready for inspection. The good faith of the partners is pledged mutually to each other, that the business shall be conducted under their actual, personal inspection, enabling each to see that the other is carrying it on for their mutual advantage, and not destroying it. Peacock *v.* Peacock, 16 Ves. 49, 51; Donaldson *v.* Williams, 1 Cromp. & M. 345; Rowe *v.* Wood, 2 Jac. & W. 553, 556. See Boynton *v.* Page, 13 Wend. 425.

money received, and all notes payable or receivable, and every other transaction which is usually put upon the books of account; and all this he must do without unnecessary delay. (*w*) So, if any partner contemplates any important transaction, we should regard it as his duty to communicate what he
* 229 * does, and what he intends to do, before he takes any preliminary steps which might embarrass the firm if the transaction should not be carried into effect, in order that the firm may do what they think proper. If, by articles or arrangements, any one partner is intrusted with the accounts, it would be a peculiar breach of duty on his part to keep them in such way as to mislead his partners, whether by misentry or by nonentry. (*x*)

4. *Of a Partner's Right to extra Compensation.*

Another point seems to be well settled, both at law and in equity. It is that no partner shall receive any special compensation for what he does, unless by agreement of the
* 230 partnership. (*y*) * If the articles, or an arrangement

(*w*) *Ex parte* Yonge, 3 Ves. & B. 36; Goodman *v.* Whitcomb, 1 Jac. & W. 589, 593. Every reasonable presumption will be made against partners whose fault it is that the partnership books are imperfect; and if they claim to be entitled to other credits than those to which the books, at the close of the partnership, entitle them, it is usual to require of them very strict proof. Bevans *v.* Sullivan, 4 Gill, 383, 391. In Beacham *v.* Eckford, 2 Sandf. Ch. 116, it was *held*, that, on the dissolution of a partnership between persons residing at different places, it is the duty of each partner to furnish to the other all their accounts, and to endeavor to adjust them to ascertain the balance; that this is especially the duty of the partner at the place where the principal business has been transacted; and that, upon the death of a copartner, this duty becomes imperative upon the survivor; and, if he neglect it, he will lose interest on the balance which may subsequently appear to have been due to him.

(*x*) See Maddeford *v.* Austwick, 1 Sim. 89; Kelley *v.* Greenleaf, 3 Story, 93, 103. It is, of course, improper to blend the accounts of the partners with the firm with the individual accounts of the partners between themselves. Honore *v.* Colmesnil, 1 J. J. Marsh. 506, 517.

(*y*) Thornton *v.* Proctor, 1 Anst. 94; Whittle *v.* M'Farlane, 1 Knapp, 312, 315; Holmes *v.* Higgins, 1 B. & C. 74; Franklin *v.* Robinson, 1 Johns. Ch. 156, 165; Bradford *v.* Kimberly, 3 id. 431; Caldwell *v.* Lieber, 7 Paige, 483; Philips *v.* Turner, 2 Dev. & B. Eq. 123; Anderson *v.* Taylor, 2 Ired. Eq. 420; Reybold *v.* Dodd, 1 Harr. 401, 415; Dougherty *v.* Nostrand, 1 Hoff. Ch. 68; Bevans *v.* Sullivan, 4 Gill, 383; Coursen *v.* Hamlin, 2 Duer, 513; Roach *v.* Perry, 16 Ill. 37; King *v.* Hamilton, id. 190; Bennett *v.* Russell, 34 Mo. 524; [Drew *v.* Ferson, 22 Wis. 651.] Upon the same principle, no partner is en-

subsequent to them, provide that one or another shall receive any special compensation for special service, this arrangement

titled to interest on moneys advanced to, or deposited with, the firm, for its use, unless there be a special agreement to that effect. Lee *v.* Lashbrooke, 8 Dana, 214; Day *v.* Lockwood, 24 Conn. 185; Desha *v.* Shepard, 20 Ala. 747. But *In re* German Mining Company, 19 Eng. L. & Eq. 591, 4 De Gex, M. & G. 19, Knight Bruce, L. J., said: "I think that mercantile usage and the general course of trade dealings do, where a partner in trade has duly and properly advanced money of his own for the purposes of the partnership business, so as to become justly a creditor in account with the partnership for the amount, raise an implied contract for interest, so as to entitle the partner advancing to have his account with the firm credited with interest accordingly, although his partners may not have authorized, and may not have known of the transaction; at least, in the absence of any express contract to the contrary." See *In re* German Mining Company, 27 Eng. L. & Eq. 158. [There is no established rule as to the allowance of interest between partners. The circumstances of each particular case must determine. Gyger's Appeal, 62 Penn. St. 73; Moss *v.* McCall, 75 Ill. 190. Interest will not generally be allowed, unless on special agreement, Tirrell *v.* Jones, 30 Cal. 655; Whitcomb *v.* Converse, 119 Mass. 38; then with annual rests before dissolution, but without rests after, Burfield *v.* Loughborough, L. R. 8 Ch. 1, disapproving Pilling *v.* Pilling, 3 DeG., J. & S. 162. But it is elsewhere held that, in taking account after dissolution, the articles allowing interest on capital, interest from that time and during the process of settlement is not to be allowed on each partner's capital contributed, Watney *v.* Wells, L. R. 2 Ch. App. 250; but otherwise, if there is no agreement for interest, Tutt *v.* Land, 50 Ga. 338. When profits are left in business, the partner leaving them does not draw interest, unless by express agreement. Dinham *v.* Bradford, L. R. 5 Ch. App. 519. Nor is a partner chargeable with interest on overdrawn profits. Maymott *v.* Maymott, 9 Jur. N. S. 496. Where by the contract partners agreed to keep one another in funds to a specified extent, and, on dissolution, one was found not to have contributed to the extent agreed, interest was allowed on the difference, to the partner whose advances were in excess of the others. Pim *v.* Harris, Irish Repts., 10 Eq. 442. Interest payable by the terms of the contract at a greater rate than the law permits, except by special contract, is to be reckoned, after the maturity of the contract, at the rate fixed by the law, in the absence of express agreement. Thus, where the rate is six per cent, unless otherwise agreed, a note payable in one year at ten per cent interest draws but six per cent after the expiration of the year. Brewster *v.* Wakefield, 22 How. (U. S.) 118; Eaton *v.* Boissoncault, Sup. Jud. Ct. Me., 5 Reptr. 270; Burnhisel *v.* Firman, 22 Wall. (U. S.) 170; Ludwick *v.* Huntsenger, 5 W. & S. (Penn.) 51; Cook *v.* Fowler, L. R. 7 H. L. 27; Pearce *v.* Hennessy, 10 R. I. 223; Kitchen *v.* Bank, 14 Ala. 233; Lash *v.* Lambert, 15 Minn. 416; Hubbard *v.* Callahan, 42 Conn. 524; Searle *v.* Adams, 3 Kan. 315. In Cromwell *v.* County of Sac, in the United States Supreme Court, February, 1878 (5 Reptr. 419), Brewster *v.* Wakefield, *supra*, is explained, if not overruled, and the contrary doctrine asserted to be established by the preponderance of authority. See also *contra*, Brannon *v.* Hursell, 112 Mass. 63; Hand *v.* Armstrong, 18 Ia. 324; Marietta Iron Works *v.* Lattimer, 25 Ohio St. 621; Hopkins *v.* Chittenden, 10 Tex. 189; McLane *v.* Abrams, 2 Nev. 199; Kohler *v.* Smith, 2 Cal. 597; Pruyn *v.* Milwaukie, 18 Wis. 367; Etnyre *v.* McDaniel, 28 Ill. 201; Kilgore *v.*

will be respected. (*z*) But if there be no such provision, the law will not make any, nor infer one from the greater industry

Powers, 5 Blackf. (Ind.) 22. But see Ayer *v.* Tilden, 15 Gray (Mass.), 178.] But, if a partner be appointed by the firm agent for a *special* purpose, he is entitled as against the firm to the usual compensation in relation to the subject of such agency. Bradford *v.* Kimberly, 3 Johns. Ch. 431; Philips *v.* Turner, 2 Dev. & B. Eq. 123. [If, in winding up their affairs, the surviving partner renders services, not strictly in settlement, but in the prosecution and execution, of contracts already existing, or new ones entered into with the consent of the administrators of the deceased partner, for the general benefit of the partnership fund, he is entitled to compensation for such service as is not in strict settlement. Schenkl *v.* Dana, 118 Mass. 236; Willett *v.* Blandford, 1 Hare, 253.] And if a partner sell half his share to another person, who becomes the general manager of the partnership business, such third party, not being a partner as respects the partner retaining his original interest in the firm, is responsible to the latter only as agent, and as against him may claim a reasonable compensation for his services. Newland *v.* Tate, 3 Ired. Eq. 226. A partner is, of course, entitled to be indemnified for outlays made by him, and obligations incurred, in the service of the partnership, and for the successful conduct of its business, though he cannot claim any thing for his management, time, and labor. Burden *v.* Burden, 1 Ves. & B. 170; Brigham *v.* Dana, 29 Vt. 1. And, *it seems*, there may be actual expenditures of money for the firm, by one partner, which partake so much of the nature of personal service that the court will not allow the firm to be charged with them, especially if the partner himself do not appear to have regarded them as items of expense incurred on partnership account. Thornton *v.* Proctor, 1 Anst. 94; *In re* The German Mining Company, 27 Eng. L. & Eq. 158. And if shareholders, or partners in such a company, at the request of the directors, the managing partners, make advances of money for partnership purposes, which are so applied, and are the means of saving the concern from ruin, and of preventing the total loss of the joint property, such shareholders are creditors of the company to the amount of their advances and interest thereon. *In re* The German Mining Company, 19 Eng. L. & Eq. 591, 4 De Gex, M. & G. 19. [See also *post*, p. * 230, note (*cc*).]

(*z*) Paine *v.* Thacher, 25 Wend. 450; Desha *v.* Sheppard, 20 Ala. 747; Pond *v.* Clark, 24 Conn. 370. See Baltyde *v.* Trump, 1 Md. Ch. 517. And where by the articles of copartnership one partner *is exempted* from the duty of rendering his personal services to the joint business, if he afterwards does render such services, at the instance and request of his copartners, he will be entitled to a reasonable compensation therefor. The general rule, that one partner cannot charge the firm for his services, is founded on the principle that each partner is bound to devote his skill and labor to the promotion of the common benefit of the concern, and is inapplicable when the reason for it fails. Lewis *v.* Moffett, 11 Ill. 392. Upon the same ground, if partners agree to invest equal amounts of capital in the joint enterprise, and one partner advance more than his share, the partnership must allow him interest on the excess. Reynolds *v.* Mardis, 17 Ala. 32. If A. & B. enter into partnership under articles by which "A. bargains and agrees to give B. four hundred and fifty dollars to manage the business," B.'s salary is to be paid not by A. alone, but by the partnership, and out of the partnership funds. Weaver *v.* Upton, 7 Ired. 458. See Reynolds *v.* Mardis, *supra*.

or greater ability of any one partner. (*a*) The principle seems to be, that partners are considered as meeting on a common ground, each engaging to do all he can do for the common good. (*b*) And, whatever any one does, he has no claim for any thing beyond his equal share of the common benefit, without the consent of his copartners. (*c*) It has, however, been held that a partner is entitled to interest on advances made to the firm, although there was no express agreement to that effect, if it may be inferred from circumstances or their usage, that an allowance of interest was intended. (*cc*)

5. *How far Partners are Trustees.*

* As a general principle, which will sometimes be of * 231 much use in determining the rights and obligations of copartners, it may be said that all partners are regarded somewhat as trustees for the firm. We have already remarked that the law of partnership is a thing by itself; but, like every other branch of the law-merchant, and indeed of the law in general, it is connected, by many relations and analogies, and many common principles, with collateral branches; and these it is often useful to consider. Thus the law is well settled in regard to trustees. A wisely adjusted system of right and obligation guides the trustee, preserves the property or interests in his hands, and protects both him and the *cestui que trust;*

(*a*) Philips *v.* Turner, 2 Dev. & B. Eq. 123. In this case, the partnership business was under the almost exclusive superintendence of the partner making a claim for extra compensation. See Caldwell *v.* Lieber, 7 Paige, 483; *ante*, p. * 227, and Cunliffe *v.* Dyerville, 7 R. I. 325.

(*b*) The principle was very fully considered by Willard, V. C., in Caldwell *v.* Lieber, 7 Paige, 483, 495. He said: "Where there is no special agreement to that effect, partners are not entitled to charge each other for their services in the management of the concern; and the law never undertakes to settle between them their various and unequal services in the transaction of their private affairs." [But if a partner refuses to discharge the duties he is bound to by the articles, he may be charged with their value in the account. Marsh's Appeal, 69 Penn. St. 30.]

(*c*) Beatty *v.* Wray, 19 Penn. 516, 519. The rule is the same after the dissolution of the firm, by death or otherwise. Partners who wind up the concern are not entitled to any extra compensation for their time and labor. Burden *v.* Burden, 1 Ves. & B. 170; Stocken *v.* Dawson, 6 Beav. 371, 376; Beatty *v.* Wray, 19 Penn. St. 516; Lyman *v.* Lyman, 2 Paine, C. C. 11, 52.

(*cc*) Morris *v.* Allen, 1 McCarter, 44; Wood *v.* Scoles, Law Rep. 1 Ch. App. 369. [See also *ante*, p. * 230, note (*y*).]

him from all undue interference and molestation while faithfully discharging his duty, and the *cestui que trust* from all injurious breach of duty. Now, a copartner has powers, opportunities, and duties, in relation to the partnership, very similar to those which a trustee has in relation to his *cestui que trust.* And, so far as they are similar, it has been repeatedly held that the same rules and principles are applicable to them, both in law and in equity. (*d*)

SECTION VII.

OF THE ARTICLES OF COPARTNERSHIP.

1. *General Principles of the Construction and Effect of Articles.*

It would be very possible for persons to enter into partnership with no articles, and no agreements whatever, excepting the bare agreement to become partners. Then the law would provide for them a set of rules and arrangements which
* 232 would cover nearly * the whole ground, and would probably be much the same with those agreed upon by parties in most cases. But generally, if not always, the parties themselves enter into some definite and special bargains or terms, which are to be taken as the foundation of their partnership. Sometimes these are agreed upon only orally, and sometimes they are expressed in writing. It does not seem that there is any difference in their effect and operation, whether spoken or written, if only they are ascertained; (*e*) but there is much difference in respect to the evidence of the agreement; for the only way to be reasonably certain of the terms of a bargain is to reduce it to writing at the time, and, as a matter of precaution, have it verified by the signatures of all who are interested in it. (*f*)

(*d*) See the remarks of Story, J., in Kelley *v.* Greenleaf, 3 Story, 93, 101. Surviving partners are trustees for certain purposes. See *ante*, p. * 227, note (*u*).

(*e*) It might be one advantage of having a *deed* of partnership, that an action of covenant can be maintained for a breach of the stipulations in it, which would be binding on the representatives of the contracting parties in the same manner and to the same extent as other specialty obligations.

(*f*) The importance of written arti

In regard to the articles of copartnership, the two most general principles have already been stated. They are, first, that the law permits partners to enter into any arrangements or engagements between themselves which are not void as against statutory provisions or the general principles of law. These may conflict with any or all of the especial rules of the law of partnership, but will be none the less binding upon the parties themselves. Thus, if A., B., & C. choose to enter into partnership, and agree that A. shall keep all the accounts, and that neither B. nor C. shall ever see them without his permission; or that A. alone shall sign the name of the firm; or that he shall share the profits, but not share any loss: (*g*) any or all of these agreements would be binding on the parties.

The second general rule is, as already stated, that these special arrangements or bargains are not binding or operative upon any third parties who are not especially informed of them, and subsequently enter into transactions in acknowledgment of them. (*h*) * The general rules of law, and the * 233 special rules of the law of partnership, every person is presumed to know, and cannot ground a right or a defence upon his ignorance of them. But no one is presumed to know those private arrangements, and no one is therefore affected by them until they are brought home to his knowledge.

cles, by which the courts may be guided in determining all questions in which the partnership or the several partners are interested, and especially as to the method of winding up the affairs of the joint concern upon a dissolution, is strongly enforced by Lord Eldon in Crawshay *v.* Collins, 2 Russ. 341–343.

(*g*) See North British Bank *v.* Collins, 28 Eng. L. & Eq. 7.

(*h*) Sandilands *v.* Marsh, 2 B. & Ald. 697; Smith *v.* Jameson, 5 T. R. 601, 603; Craven *v.* Widdows, 2 Ch. Ca. 139; Hawken *v.* Bourne, 8 M. & W. 703, 710; Tradesmen's Bank *v.* Astor, 11 Wend. 87, 90; Tillier *v.* Whitehead, 1 Dallas, 269; Devin *v.* Harris, 3 G. Greene, 186; Nichols *v.* Cheairs, 4 Sneed, 229. The proposition of the text is frequently illustrated by cases in which it has been stipulated that some one or more of the partners shall not have the power of putting the firm name to negotiable paper. If, notwithstanding such stipulation, the prohibited partners do exercise this power, the partnership is bound, unless knowledge of such prohibition, actual or constructive, can be fixed upon the party taking the paper; and it makes no difference that the stipulation be made in favor of a dormant partner. Winship *v.* Bank of United States, 5 Mason, 176, 5 Pet. 529; Grant *v.* Hawkes, Chitty on Bills, 42; South Carolina Bank *v.* Case, 8 B. & C. 427; Smith *v.* Lusher, 5 Cow. 689, 710; Walden *v.* Sherburne, 15 Johns. 409; Whitaker *v.* Brown, 16 Wend. 505, 508; Bank of Rochester *v.* Monteath, 1 Denio, 402, 406; Gano *v.* Samuel, 14 Ohio, 592; Bank of Kentucky *v.* Brooking, 2 Litt. 41; *ante*, ch. 6, § 3.

There remain to be considered the rules and principles which courts apply to the construction of partnership articles. In the first place, so far as the articles contain provisions which the law would create between the partners if the articles did not, they might be regarded as surplusage. But if any question arose as to the bearing, application, or exact effect of these rules, great regard would be paid to the intention of the parties as it was expressed in their articles. (*i*)

(*i*) Gainsborough *v.* Stork, Barnard Ch. 312. General language used in one place will sometimes be construed to run through and pervade the whole body of the articles. Thus, the words of covenant, generally occurring at the commencement of a partnership deed, usually declare the covenant to be joint and several; and words of covenant subsequently occurring in the instrument are on that account usually construed to be intended to be also joint and several. But it is to be borne in mind that, whatever may be the form of a covenant, if the interest and cause of action be joint, the action must be by all the covenantees; and, on the other hand, if the interest and cause of action be several, the action may be by one. Hence, notwithstanding the rule of construction we have just stated, where the covenant, introductory to a partnership deed, is declared to be joint and several, some of the covenants in the instrument may be such that the partner committing a breach can be sued only by all the rest jointly, while for the breach of others a several action by one of the partners may be maintainable. Eccleston *v.* Clipsham, 1 Saun. 153. See Owston *v.* Ogle, 13 East, 538; Servante *v.* James, 10 B. & C. 410.

There may be single and particular provisions in partnership articles, which, from change of circumstances, lapse of time, or in other ways, have come to be entirely inconsistent with and contradictory to the whole scheme and tenor of the agreement. In such case, a court of equity regarding the general object and purpose of the parties as superior to and controlling any lesser and subordinate intent, will refuse to carry into effect the minor and inconsistent stipulation. See this illustrated with respect to the clause giving to two-thirds of the partners the power to expel a member of the firm. Blisset *v.* Daniel, 11 Hare, 493, 25 Eng. L. & Eq. 105. See also *Ex parte* Croxton, 11 Eng. L. & Eq. 227, 1 De Gex, M. & G. 600, as to the construction of apparently inconsistent stipulations respecting the liabilities of a retiring partner.

When a partnership consists of very many partners, as in a joint-stock company, the partners are to be held, as strictly as may be, to the terms of association. *Ex parte* Lawes, De G., M. & G. 421, 10 Eng. L. & Eq. 162.

In the construction of partnership articles, Lord Eldon said, in Greddes *v.* Wallace, 2 Bligh, 295: "You are to take the whole instrument together, and you are not only to look at the whole of the instrument together, but you are to look at the transactions of the parties; for, whatever may be the language of a partnership deed, the dealings and transactions among the partners may be such as to amount to distinct evidence that some of the articles in that partnership deed were waived by all parties, and that some of the articles in that deed were not to be considered as rules which should regulate the rights and duties of the partners." And partnership articles are read in a court of equity as not containing the clauses on which the parties have not acted. Lord Eldon in Jackson *v.* Sedgwick, 1 Swanst. 469. But the topic of the waiver of partner-

* If any of the rules of partnership law are not interfered with by the articles, — that is, if the articles are silent on any points established by the law, — it will be presumed that the parties intended that the right given and the duties imposed by the law in these respects, suited them perfectly, and all such rules of law will be enforced in the same manner as if they entered into the articles. (*j*) * 234

2. *Bill in Equity for Specific Performance of Articles.*

Most of the questions litigated under articles of partnership come before courts of equity; nor is there any doubt as to the full jurisdiction of equity over these articles, or any general difference between the principles which equity applies to questions of partnership and those applicable to other questions of an analogous character. (*kk*)

A very frequent prayer of a complainant in equity is for a * decree for a specific performance. This prayer the court will hear in some form, whether the act required is demanded by the articles, or is a legal obligation created by the law; and will grant, as in ordinary cases, provided the contract or duty be clearly made out, and there is no waiver on the complainant's side, or no breach on his part justifying that of which he complains; and provided the performance prayed for is practicable, remedial, and just as between * 235

ship articles will be separately considered hereafter. *Post*, subsection 3, p. * 245.

(*j*) In Crawshay *v.* Collins, 15 Ves. 218, 226, Lord Eldon said: "Partnerships are regulated either by the express contract, or by the contract implied by law from the relation of the parties. The duties and obligations arising from that relation are regulated, as far as they are touched by the express contract; if it does not reach all those duties and obligations, they are implied and enforced by the law. Smith *v.* Jeges, 4 Beav. 503, 505. See Jackson *v.* Sedgwick, 1 Swanst. 469. [The written articles of partnership, including the arbitration clause, continue in force, so far as applicable, when the partnership is continued beyond the term limited by the articles. Gillett *v.* Thornton, L. R. 19 Eq. 599; Parsons *v.* Haywood, 31 Beav. 199. But special and unusual provisions of a penal nature will not be considered as in force after the expiration of the term. Clark *v.* Leach, 8 L. T. N. S. 40. A stipulation, in partnership articles, that neither shall sell his interest without the consent of the others, has no application after a dissolution, and the appointment of a receiver. Noonan *v.* McNab, 30 Wis. 277.]

(*kk*) Whitman *v.* Robinson, 21 Md. 30; Homfray *v.* Fothergill, Law Rep. 1 Eq. Cas. 567; Ibbotson *v.* Elam, id. 188.

the parties, and not injurious to third parties. But one principle, which often prevents this decree in ordinary cases, is frequently applicable in partnerships. It is this: A partner may bind himself by articles, to be honest, diligent, skilful, &c., and is bound by law to be the first perfectly, and the others as far as the exigencies of the partnership require and his capacity permits. And any breach of these obligations, actual or intended, equity will prevent by injunction, if that suits the case, or apply any other proper remedy. But no specific performance can be decreed; for an order of the court to be honest, or faithful, or diligent, or skilful, would only require of him to do what the law and his promise already require. And there is the further objection, that it is difficult, not to say impossible, to draw an exact defining line, and say how industrious or skilful a partner shall be, or how he shall prove his honesty. But if his fraud, his negligence, or his ignorance threaten an actual mischief which the court can prevent, or have caused one for which he can make compensation, the aid of the court will then be given. We have mentioned this subject here, as it seemed necessary to notice it in connection with the articles of copartnership; but shall treat of it more fully hereafter, when considering the general subject of the equitable processes and remedies between partners. (*k*)

Equity is sometimes called upon to decree a performance of an agreement to enter into partnership. There can be no doubt whatever of the perfect competence of the court to make such a decree, if they see fit. (*l*) But there are so many * 236 possible objections * to it, that, in point of fact, it very seldom is made or asked for. If the agreement is for a term of time, a court would hesitate before it compelled parties to enter a relation of long endurance, in which it is, above all

(*k*) *Post*, ch. 8, §§ 3 and 4.

(*l*) Buxton *v.* Lister, 3 Atk. 383; Anonymous, 2 Ves. Sen. 630; Birchett *v.* Bolling, 5 Munf. 442; 2 Story Eq. § 718; Adderly *v.* Dixon, 1 Sim. & S. 610, 611. See further the opinion of Wilde, J., Clark *v.* Flint, 22 Pick. 231, 239. The specific performance of an agreement for a partnership may be enforced by compelling the parties to execute the proper partnership deed. Hibbert *v.* Hibbert, Collyer on Part. § 203; England *v.* Curling, 8 Beav. 129. So a court of equity may compel a partner to contribute the sum stipulated as capital, or to restore it to the common fund, if he have withdrawn it before the debts are paid. Robinson *v.* McIntosh, 3 E. D. Smith, 221.

things, necessary that there exist entire mutual confidence and the most unembarrassed co-operation; although there are, undoubtedly, instances of this, enough perhaps to constitute a general rule. (*m*) If, on the other hand, no term of time is fixed by the agreement, it would be merely nugatory for equity to decree a partnership which the reluctant partner might terminate the moment after. (*n*) It is easy, however, to suppose cases where a person had made arrangements with a view to a partnership distinctly agreed upon, which would now bring upon him great loss and mischief, if that partnership did not at least begin to be. There may have been an actual partnership for a time, and then one of the partners refuse to consider himself partner under the articles, or to allow them any force, to the great detriment of the other. In any such case, there can be no reason why a court of equity should not decree a partnership. And we apprehend that a partnership might thus be formed by order of court, to be dissolved at once at the pleasure of one party, but yet substantial justice be done by clothing the parties with the obligations and the rights which result from a partnership, however brief it may be. (*o*) If

(*m*) See cases cited in last note; Anonymous, 1 Madd. Ch. (3d ed.) 525. See Van Sandan *v.* Moore, 1 Russ. 441, 463; Birchett *v.* Bolling, 5 Munf. 442; England *v.* Curling, 8 Beav. 129; Manning *v.* Wadsworth, 4 Md. 59.

Though the court decree the specific performance of an agreement to let the plaintiff into a trade, *it seems*, it will not direct an account of the profits from the time the plaintiff ought to have been admitted; his remedy, in that respect, being complete at law. Anon., 2 Ves. Sen. 630. *Sed qu.*

(*n*) In Hercy *v.* Birch, 9 Ves. 357; 2 Hov. Supp. 174, Lord Eldon refused to enforce specifically an agreement for a partnership without limitation of time, observing: "No one ever heard of this court executing an agreement for a partnership, when the parties might dissolve it immediately afterwards." It has been said, that Lord Eldon was not quite satisfied with this decision. 1 Madd. Ch. (3d ed.) 525, n. 1. In Buxton *v.* Lister, 3 Atk. 383, and Anon., 2 Ves. Sen. 629, no difference, in this particular, between partnerships for a term and those without limitation of time, seems to have been adverted to.

(*o*) Mr. Swanston, in his note to Crawshay *v.* Maule, 1 Swanst. 513, alluding to the distinction taken between executory contracts of partnerships to last for a term, and those without such limitation of time, with reference to their being specifically enforced, remarks: "This distinction, however, must be received, it is presumed, not without qualification. In many such cases, though the partnership could be immediately dissolved, the performance of the agreement (like the execution of a lease after the expiration of the term, see Wilkinson *v.* Torkington, 2 You. & Col. 726) might be important, as investing the party with the legal rights for which he had contracted." See Downham *v.* Matthews, cited in 1 Ves. Sen. 497, 499. [If justice require it, under spe-

*237 it were necessary, * we know not why equity may not decree a partnership as of a past day, if justice required this, by the application of that familiar principle, that equity will consider that as actually done which certainly ought to have been done.

Another general objection to a decree that certain persons should become partners is, that it can seldom be necessary. Damages may be recovered at law for a breach of the contract, in an action of assumpsit, which is itself a kind of equitable action; and, generally, these may be estimated on principles which would make them fully compensative. Indeed, they may be recovered at law in some cases in which equity would refuse a specific performance, on the ground that it would be ineffective and useless. (*p*) It must be remembered, however, that this action is not maintainable at law, unless the particulars of the agreement on the one hand, and of the breach on the other, can be distinctly proved. (*q*) If the agreement is under seal, then covenant will lie. 'Here, however, as appears by the only case of the kind that we are aware of, the question of priority of covenants and priority of breach may be very material. For if the plaintiff has failed to do something obligatory on his part and tending towards the partnership, this may furnish an adequate excuse to the defendant. (*r*)

3. *Of Waiver of Provisions in the Articles.*

*238 * The provisions agreed upon by the parties, whether orally or in writing, may be waived by them, or modified in any way they please. And courts of equity will sometimes imply such waiver or modification from facts. Thus, it is an

cial circumstances, the court will decree a specific performance, though generally not. Scott *v.* Rayment, L. R. 7 Eq. 112.]

A court of equity, in some cases, may inhibit a partner from dissolving the firm. Chavany *v.* Van Sommer, cited in 3 Wood. Lec. 416, n.; also, in Crawshay *v.* Maule, 1 Swanst. 511, note; Ramsbottom *v.* Parker, 6 Madd. 5.

(*p*) M'Neil *v.* Reid, 9 Bing. 68, 2 Moore & S. 89. See Manning *v.* Wadsworth, 4 Md. 59.

(*q*) Figes *v.* Cutler, 3 Stark. 139. Compare this with M'Neil *v.* Reid, 9 Bing. 68. See Gale *v.* Leckie, 2 Stark. 107, 108; Vance *v.* Blair, 18 Ohio, 532. It is a sufficient consideration for a promise to admit a stranger into a firm, that the latter will become a partner. Byrd *v.* Fox, 8 Mo. 574.

(*r*) Walker *v.* Harris, 1 Anst. 245. See 1 Wms. Saund. 320, n. 4; Glover *v.* Tuck, 24 Wend. 153; Morrow *v.* Saunders, 1 Brod. & B. 318.

established rule that provisions in the articles which the partners have never acted upon, but, for a sufficiently long time, have wholly disregarded, will be considered as expunged. (*s*) If there is only silence and neglect from which to infer this, they must be long continued, and such as not to be fairly open to any other explanation than that the parties understood the provision thus disregarded to have no force. If the silence or non-observance be brief, but these are strengthened by acts of the partners opposite in their nature and effect to those provisions, and not to be reconciled with any regard to them, the same inference will be made. (*t*) It is equally true that no one partner has a right to violate the provisions, and that all the partners together have a right to annul or amend them. And if one partner violate them and the rest follow his example, or, without doing the same thing, approve by word or act of what he does, or, perhaps, if they do not oppose it, here would be evidence of a new agreement.

On one point the courts seem to construe articles quite strictly; and that is in relation to any material change or enlargement of the business; for this they require an unanimous consent. We *apprehend that no courts *239 would now give this power to a mere majority. (*u*)

4. *Of Renewal of a Partnership.*

It happens quite often that a partnership, limited by the articles to a certain time, continues after that time, and is car-

(*s*) Partners, if they please, may, in the course of the partnership, come to any new arrangement, for the purpose of having some addition or alteration in the terms on which they carry on business, provided those additions or alterations be made with the unanimous concurrence of all the partners. England *v.* Curling, 8 Beav. 129, 132. See Solomon *v.* Solomon, 2 Kelley, 18; Lord Eldon in Jackson *v.* Sedgwick, 1 Swanst. 460, 469; Boyd *v.* Mynatt, 4 Ala. 79. See Smith *v.* Chandos, Barnard. Ch. 419; *ante*, p. *233, note (*i*).

(*t*) In Const *v.* Harris, Turner & R. 523, Lord Eldon said: "In ordinary partnerships, nothing is more clear than this, that although partners enter into a written agreement, stating the terms upon which the joint concern is to be carried on, yet, if there be a long course of dealing, or a course of dealing not long, but still so long as to demonstrate that they have all agreed to change the terms of the original written agreement, they may be held to have changed those terms by conduct." Jackson *v.* Sedgwick, 1 Swanst. 460, 469. See McGraw *v.* Pulling, 1 Freeman Ch. 357, 371.

(*u*) Natusch *v.* Irving, Gow on Part. App. 398; *ante*, p. *197. Respecting the rights of a majority, see *ante*, p. *218, et seq.

ried on by the same parties in much the same way, with no new articles, and no formal notice or renewal of the old ones. The question may then arise, as to the effect of the articles upon the new firm under these circumstances. We should say that the answer must depend mainly on the conduct of the parties. If they go on precisely as before, or in such a way as to indicate no intentional departure from such a course, the former articles would have much influence in determining the terms of their present association, and probably their provisions would be held to be those of the present partnership, excepting such, if any there were, as were plainly inapplicable to the present state of things. (*v*) On the other hand, if the firm varied or departed from these provisions, or appeared to adopt new ones, they would be considered as making, so far, a different bargain from the old ones. In every case, the former articles could be considered as a guide only to the meaning of the parties, and not as obligatory upon either of them, unless some one of the partners had acted so far on the presumption that the articles remained in force, with the knowledge
* 240 * and implied assent of the other partner, that those articles could not be set aside without doing him a wrong. It should be noticed, however, that a partnership, silently continued upon old articles, is dissolvable at the will of either partner, although those articles contain a distinct limitation of time. (*w*) The renewal of this limitation of time would seldom be presumed from acts, or sustained by the law

(*v*) "We know, that after the expiration of the time at first agreed upon, partnerships frequently continue without a new agreement; and the effect of that is, that the partners, after the expiration of the partnership term, continuing to carry on the trade without a new deed, all the old covenants are infused into the new series of transactions." Per Sir Anthony Hart, in Booth *v.* Parks, 1 Molloy, 466; Crawshay *v.* Collins, 15 Ves. 218, 228; Bradley *v.* Chamberlin, 16 Vt. 613; Mifflin *v.* Smith, 17 S. & R. 165. In United States Bank *v.* Binney, 5 Mason, 176, 185, Mr. Justice Story, stating the doctrine on this point, said: "The articles expired by their own limitation, in two years; and had force no longer, unless the parties elected to continue the partnership on the same terms. That is matter of evidence upon the whole facts. The natural presumption is, that, as the partnership was continued in fact, it was continued on the same terms as before, unless that presumption is rebutted by the other circumstances in the case. There is no written agreement respecting the extension of the copartnership, and therefore it is open for inquiry upon all the evidence."

(*w*) Booth *v.* Parks, 1 Molloy, 466; Featherstonaugh *v.* Fenwick, 17 Ves. 298.

as a part of a new bargain, on any thing less than proof that the parties had expressly so agreed. (*x*)

The articles sometimes provide for a continuance of the partnership after the death of one or more partners. This is much more common in England than here; but is not unknown here, and such provisions may give rise to difficult questions. These, however, we shall consider when we treat of dissolution by the death of a partner.

5. *Of Provisions for Advances by a Partner.*

The articles of partnership not unfrequently contain agreements that one or all of the partners should pay into the capital stock of the firm certain moneys, at certain times and on certain terms. Any partner is considered, as to any such obligation, merely as a debtor to the firm; and his rights and his responsibilities are the same with those of any other debtor. (*y*) This

(*x*) The original articles of a copartnership provided that it should last seven years. At the end of that time, the defendants, who resided in this country, transmitted to the complainant in London (where he resided) the partnership articles, with an indorsement of a renewal of them for another term of seven years, to commence from the expiration of the last. The complainant, in his answer to the defendants' letter, enclosing the renewal, said that he would agree to it if he were relieved from his difficulties on the arrival of the ship "Carolina." The "Carolina" did arrive, and both complainant and defendants went on with the business in the same manner as had been done while the original articles were in force. But the complainant never made any formal renewal of the articles. The defendants therefore contended that the partnership which continued was not for seven years, but was determinable at will. The court held otherwise, and considered that the complainant's resumption of his duties as a partner on the original terms was a substantial renewal of the articles on his part, and was such an assent to the written renewal of them by the defendants as would be binding on him, if the defendants had insisted upon it. Dickinson *v.* Bold, 3 Desaus. 501.

(*y*) A partner, by failing to contribute his share of the partnership fund, does not in ordinary cases forfeit the interest which he already has in the firm, especially if no extraordinary emergency require the payment. Pratt *v.* Oliver, 3 McLean, 27. See Patterson *v.* Ware, 10 Ala. 444; Turnipseed *v.* Goodwin, 9 id. 372. And one partner, after accepting the money and services of another, shall not, when called upon to carry out the partnership, be permitted to deny that any joint interest ever existed, because the other partner has failed to furnish as much money for partnership purposes as he agreed to. Stein *v.* Robertson, 30 Ala. 286. The means which partners may employ to enforce their rights, when any one partner neglects to contribute his proper quota to the joint fund and the launching of the partnership, will be more appropriately considered when we treat of the remedies of partners between themselves. *Post*, ch. 8, § 2.

* 241 is * carried so far, that, where two had agreed to pay large sums, through a considerable period, to one, in consideration that he would take them into partnership, and this one became bankrupt soon and before most of the sums were paid, it was *held* that his assignees were entitled to those instalments. (*z*) If, however, a partner owes money to the firm, on any ground, he may refuse to pay it if the other partners, also owing money to the firm, refuse to pay. The reason of this is simply, that the first partner claims in substance that a balance is due to him, or would be due if all the partners paid the charges against them, or that his debt would be diminished; and, where such a claim is made in good faith, he cannot be compelled to pay, unless they pay. (*a*)

In general, where a sum of money is advanced to a partner, or a partner is permitted to take it as a loan, and there are no express terms agreed on, his profits are in the first place answerable; and, if they are insufficient, his share of the stock goes to discharge this balance; and, if that be insufficient, he becomes a personal debtor for the balance. (*b*)

6. *Of Provisions as to the Accounts.*

* 242 * The articles sometimes contain provisions as to the accounts, how they shall be kept, or how settled; and these provisions also are protected by law, but only so far as justice will permit. (*c*) Thus, it may be provided that accounts

(*z*) Ackhurst *v.* Jackson, 1 Swanst. 85, 89. Per The Master of the Rolls: "In almost all partnerships, a loss follows the bankruptcy of any of the partners; a thousand instances must have occurred of loss by bankruptcy in circumstances similar to the present, yet no precedent is produced of the interposition of a court of equity. The reason is evident. The loss is not a breach of the contract, but a contingency subject to which the parties purchased. The defendants bought the right of becoming partners; they became partners; the partnership ended by an event by which it was, in its nature, liable to be determined. . . . Upon a division, the whole price became, according to the terms of the agreement, *debitum in præsenti*, although *solvendum in futuro*. In equity, as well as at law, the contract has been performed, and the consideration must be paid."

(*a*) Foster *v.* Donald, 1 Jac. & W. 252; Richardson *v.* Bank of England, 4 Myl. & C. 171.

(*b*) Crawshay *v.* Collins, 2 Russ. 325, 347, per Lord Eldon.

(*c*) In the absence of special stipulations, the rule is that the accounts must be taken in the usual way. Jackson *v.* Sedgwick, 1 Swanst. 469. The duty of each and all of the partners to keep proper books of account, always ready for inspection, we have

once settled shall not be reopened but for fraud discovered; and yet a material error, through gross negligence, would undoubtedly be corrected in equity. It is prudent to guard settled accounts from too easy or too hasty reconsideration; and not only will the courts enforce reasonable provisions made for this purpose, but equity would not permit settled accounts to be reopened without good and certain cause, even where there was no such provision. (*d*) On the other hand, if it be agreed that no accounts between the partners which have once been closed shall be reopened after the death of any party to them, it is clear that equity would reopen them on proof of fraud, either by the deceased partner or against him. (*e*) The articles * may also provide a method of closing the ac- * 243
counts and dividing the property at dissolution. These provisions, however, will be considered when we speak of the dissolution of a partnership.

already considered. We have also seen that partners may waive any of the provisions of the partnership deed, and that they may do this not only by express agreement, but by conduct in opposition, or without regard to, the articles. The doctrine is as applicable to stipulations respecting the joint accounts, the mode and time of balancing them, &c., as to any other. Pettyt *v.* Janeson, 6 Madd. 146; Jackson *v.* Sedgwick, 1 Swanst. 460. [When a new partnership is formed, for the purpose of transferring property to it, so that it cannot be attached by the creditors of a former firm, a partner in the new firm may maintain a bill for an account, notwithstanding one of the objects of the formation of the firm was to delay, hinder, and defraud creditors. Harvey *v.* Varney, 98 Mass. 118.]

(*d*) Gainsborough *v.* Stork, Barnard. 312. See Stoughton *v.* Lynch, 2 Johns. Ch. 218; Roberts *v.* Totten, 8 Eng. 609. If it be stipulated that one partner shall make up and state the joint accounts, and he do so in the absence of his copartner, *ex parte*, it is the duty of the latter to look into them within a reasonable time, and to point out the errors, if any exist; or he will be considered as having acquiesced in the correctness of the accounts as stated on the books of the firm. In stating the accounts of partners, as between themselves, the entries on the partnership books, to which both parties have had access at the time when those entries were made, or immediately afterwards, are to be taken, *primâ facie*, as correct; subject, however, to the right of either party to show a mistake or error in the charge or credit. Heartt *v.* Corning, 3 Paige, 566, 572. And see Lynch *v.* Bitting, 6 Jones Eq. 238. *Post*, p. * 514.

(*e*) By articles of partnership, it was agreed that just and true accounts should be made out half-yearly, and signed by the partners; and that such accounts should not afterwards be called in question, except for errors discovered in the lifetime of all the partners. The accounts were made out by one of the partners; and, after the death of two of the other partners, it was discovered that the accounts were fraudulent. *Held*, by Sir Lancelot Shadwell, Vice-Chancellor, that the fourth partner was entitled to have the accounts of the partnership taken from the date of the articles. Oldaker *v.* Lavender, 6 Sim. 239. See North British Bank *v.* Collins, 28 Eng. L. & Eq. 7.

7. *Provisions for giving Care and Skill and Time to the Partnership.*

The general law of partnership requires of each partner, as we have already seen, due devotion of his time and care to the concerns of the firm, and entire absence from all business on his own account which can interfere with this duty to the firm. (*f*) Sometimes the articles of partnership contain provisions on this point; (*g*) and they may have the effect of enlarging the power of a partner to engage in other and independent employments. For if they provide that no partner shall engage in this or that business, specifying them particularly, the maxim, that the expression of one thing excludes what is not expressed, might leave each partner at liberty to engage in other branches of business, not enumerated. (*h*) But this

(*f*) [American Bank-Note Co. *v.* Edson, 56 Barb. (N. Y.) 84.] Where there are no covenants, a man may engage in as many partnerships as he pleases, provided he does not violate the principle stated in the text. Caldwell *v.* Lieber, 7 Paige, 483, 494, per Willard, V. C. [If justice require it, one partner will be enjoined from engaging in any business prejudicial to the firm, whether there be a covenant against it or not. Marshall *v.* Johnson, 33 Ga. 500.] The right of a partner who withdraws from the firm to engage in the same business which the remaining partners are prosecuting, or in any rival or hostile business, will be considered when we come to treat of the consequences of dissolution, and therein of retiring partners.

(*g*) "In partnership engagements, a covenant, that the partners shall not carry on for their private benefit that particular commercial concern in which they are jointly engaged, is not only permitted, but is the constant course." Morris *v.* Colman, 18 Ves. 438; Universities of Oxford and Cambridge *v.* Richardson, 6 id. 706. And, in such case, if one of the partners violate this covenant, the rest may join in suing him for the breach; he being in that respect several from them all, and they all joint against him. Thimblethorp *v.* Hardesty, 7 Mod. 116; Eccleston *v.* Clipsham, 1 Saund. 153; Spencer *v.* Durant, Comb. 115; Saunders *v.* Johnson, Skin. 401.

(*h*) In Glassington *v.* Thwaites, 1 Sim. & S. 132, Sir John Leach said: "If some of the proprietors of a morning paper are also the proprietors of an evening paper, they may have a stronger interest to promote the success of the evening paper than of the morning paper, and a strong temptation to use the information obtained at the expense of the morning paper for the benefit of the evening paper. This temptation forms a powerful objection in all cases to the partner in the concern of one newspaper being permitted to be a partner in the concern of any other newspaper. But it is an objection founded on the principle of policy and discretion, against which parties may protect themselves by their contracts; and, accordingly, it is a common covenant, in such partnership articles, that no partner shall be the proprietor of any other newspaper. In the present case, there is actually a covenant that the proprietors will not be concerned in any other morning

would not be pressed too far. No such * maxim or prin- * 244
ciple would countervail the general principle requiring good faith and mutual co-operation between the partners. And, therefore, it would not permit a partner to injure his firm, for his own benefit, by allowing any mere implication to give him power to do so. (*i*) But, on the other hand, any agreement respecting the business would be extended by construction far enough to give to partners the protection it was intended to afford. (*j*) It seems, however, that an agreement not to engage in the same business, on the partner's own account, does not prevent him from canvassing for future business when he shall be by himself. (*k*) But if a partner, under such agreement, violate it by engaging in independent business, equity may require of him to admit his partners as partners also in that business. (*l*) If, however, a partner under such agreement, with the consent of his partners, enters into or forms a new copartnership for the same business, this will not make the partners of the new firm copartners in the old firm. (*m*)

8. *Of Provisions for a Dissolution.*

Equity has in general full power to decree dissolution, and to remove a copartner for sufficient reasons; but, if this subject enters into the articles, all provisions respecting it — as to the cause, the time, the manner, and consequences — will be respected, so far as * they do not conflict with justice; * 245
and an equitable construction will be given to any lan-

paper, which, by implication, affords the conclusion that it was the intention of the parties that they might engage in the concern of any evening paper." See also Caldwell *v.* Lieber, 7 Paige, 483, 496.

(*i*) This is well illustrated by the case from which we have just quoted, Glassington *v.* Thwaites, 1 Sim. & S. 124.

(*j*) Where two entered into partnership for eleven years, in the trade of brewers, and agreed that, "if during the term either should desire to quit the said art or mystery, he should give six months' notice of his intention, at the end of which the other party should be at liberty to continue the trade on his own account," it was *held*, that the party giving notice could not carry on the trade elsewhere on his own account; but that he must either continue the partnership, or give up such trade altogether. Cooper *v.* Watlington, 2 Chitty, 451, 3 Doug. 413.

(*k*) Coates *v.* Coates, 6 Madd. 287.

(*l*) Somerville *v.* Mackay, 16 Ves. 382. See Caldwell *v.* Lieber, 7 Paige, 482; Moritz *v.* Peebles, 4 E. D. Smith, 135.

(*m*) Bosanquet *v.* Wray, 6 Taunt. 597.

guage on the subject. (*n*) Thus, if insolvency be named
* 246 as a cause for which a partner may be removed, * this

(*n*) A recent case decided in the English Court of Chancery, by the Vice-Chancellor, Sir William P. Wood, exemplifies the view in which courts of equity regard clauses of expulsion in deeds of copartnership, and the manner in which such provisions are construed, and their operation controlled, so as to prevent their working injustice or oppression. Blisset *v.* Daniel, 11 Hare, 493, 25 Eng. L. & Eq. 105. The firm of John Freeman & Copper Company had carried on a very large business for more than a century, when, in 1844, the then partners, including the plaintiff, Blisset, and six other persons, executed new articles, though in the form which had always been used by the ancient firm. By these articles, the firm was to continue fourteen years from the 30th June, 1843. The joint effects were estimated at 72,000*l.*, the whole capital being put at 112,500*l.*, divided into twenty-five shares of 4,500*l.* each, only sixteen of which (equal to 72,000*l.*) were to be considered as occupied, the other nine shares being held in suspense for any persons who might thereafter be admitted by partners holding two-thirds of the occupied shares. With respect to the accounts of the firm, the articles provided that, within sixty days after the 30th of June in each year, all the accounts of the partnership, both with those with whom they dealt and with each and every one of the partners, should be settled and brought to a balance, so that the true state and condition of the partnership or joint trade, and the respective shares and interests of the parties therein, might clearly and plainly appear. Such settlement, when made and signed by the partners, to be binding, unless some error to the extent of 1,000*l.* should be detected within six months. If any partner refused or neglected for three months to sign the accounts, any other partner might sign for him. If a partner retired (as he might, by the consent of a majority of his copartners), the remaining partners to take his share at the last annual estimate.

Then followed the clause of expulsion, which had always been inserted in the various partnership deeds, and which it was now attempted to enforce against the present plaintiff: "That it shall be lawful for the holders of two-thirds or more of the shares for the time being, from time to time to expel any partner, by giving to or leaving for him, at his then or last place of abode in England or Wales, a notice in writing, under their hands, of such expulsion; which, in that event, shall operate from and at the time of the giving or leaving such notice, and shall be in the following form, namely: 'We do hereby give you notice that you are expelled from the partnership carried on under the firm of John Freeman & Copper Company. Witness our hands this —— day of —— in the year of our Lord 18—.'" Notice of the dissolution of the firm as to the expelled partner, drawn in a prescribed manner, and signed by the remaining partners, was to be published in certain papers. It was then farther provided, that, upon the bankruptcy, insolvency, *or expulsion* of a partner, the same arrangement should be adopted for ascertaining the amount of his share, and for the payment thereof, &c., as would have been applicable in the event of his decease. But, though three-fourths of the partners might dissolve the firm, the retirement, death, bankruptcy, insolvency, or expulsion of any one or more of the partners, should not have this effect as to the remaining partners; but the shares of the partners deceased, expelled, &c., should be disposed of at the pleasure of a majority of the holder of shares.

The above are all of the articles between the parties bearing directly on the present question. Under them,

will be *held* to mean any actual inability to pay one's debts, through inadequacy of means, and not be limited to a formal

the joint business was harmoniously conducted for some years. Various changes in the partnership took place. Two of the partners died, and their shares were taken by the survivors, according to the provisions of the deed. At a meeting of the then partners, on the 26th August, 1850, Vaughan, one of the defendants, and the manager of the joint business, proposed that his son, who had just come of age and been admitted as a partner for one share, should be joined with him as assistant managing partner. The plaintiff objected, and the plaintiff left the meeting without any thing being fixed. Vaughan complained much of the conduct of the plaintiff, said that either the plaintiff must leave the concern, or he himself would, and pointed out to the other partners the long-forgotten clause of expulsion. But nothing of this was communicated to the plaintiff; and on the 29th of August, at their usual meeting, all the partners signed the balance-sheet of the 30th June then last. As soon as this had been done, the resolution of Vaughan was announced to the plaintiff; but, even then, nothing was said to him about acting upon the clause of expulsion. On the evening of that day, however, the plaintiff received a notice that he was expelled from the firm, drawn according to the terms of the partnership deed; and the prescribed notice of dissolution was, as far as practicable, published in the specified papers. The plaintiff, however, refused to sign the notice of dissolution. It farther appeared that none of the partners, except Vaughan, desired their connection with the plaintiff to cease, and that they had been induced to sign the notices of expulsion and dissolution by the suggestions and arguments of Vaughan, and his threats to leave the management of the business if they did not.

Upon these facts, the Vice-Chancellor said that, among other questions, this arose, viz.: Whether the power of expulsion, in the articles of partnership, could be exercised, without any cause assigned, by partners holding two-thirds of the occupied shares, by their signing a note in the form prescribed by the articles, without any previous meeting in committee with each other. And it was *held*, that no previous meeting of the partners was necessary, and that no cause for giving the notice of expulsion was necessary to be assigned or established.

The court then considered the question, whether, assuming this power of expulsion to exist, it had been so exercised that the court would give effect to it, and declare that the plaintiff had ceased to be a partner. The Vice-Chancellor said, that all the partnership stipulations must rest upon a basis of good faith; that the principles of good faith, as applied to partnership, had settled that a partnership cannot be dissolved by any partner for his own benefit; that, therefore, the literal construction of the present articles could not, in all cases, be enforced; that the power of expulsion, given by the articles in the present suit, to two-thirds of the partners, was never created with the view that it might be exercised by them for their own private benefit; that it was inserted in the deed to be used, not for the benefit of the two-thirds exercising the power, but on behalf of the whole partnership. Applying these principles to the case at bar, his Honor *held*, that, considering the concealment from the plaintiff of any intention on the part of the partners to act on the clause of expulsion until after he had signed the annual balance-sheet, and in view of the fact that Vaughan had procured the concurrence of the other partners to the expulsion, for his own benefit, and by the use of threats, and by the undue exercise, in other ways, of his influence upon the minds of his copart-

*247 *insolvency under the statute. (*o*) In general, however, it would be *held*, that a partner should not be liable to removal for the first steps towards, or imperfect doing of, an act which it is agreed shall give the right of removal, but only for its completion. (*p*)

9. *Of Provisions for the Determination of Differences by Arbitration; for the Powers of a Majority; or for Division of Profits.*

Not unfrequently, articles of partnership contain a clause, that all disputes between the partners, or all questions arising at dissolution, or certain other questions, shall be submitted to arbitration. (*q*) But the same rule will doubtless be applied to this provision in the articles as to a similar one in policies of insurance, or indeed any other instrument. Upon this subject, the law has changed, somewhat suddenly, but decidedly, in England, both by statute (*r*) and by adjudica-

ners, there being no proof of any misconduct on the part of the plaintiff, the power of expulsion given by the articles had not, in the present instance, been exercised *bonâ fide*. See, also, as an interesting case of the expulsion of a partner, under provisions in the articles of copartnership, Patterson *v.* Silliman, 28 Penn. St. 304.

(*o*) Parker *v.* Gossage, 2 C., M. & R. 617; Biddlecombe *v.* Bond, 4 Ad. & El. 332.

(*p*) By articles of copartnership, it was provided, that it should be lawful for the partners to dissolve the partnership as to any partner who should make any mortgage, pledge, sale, assignment, or other disposition of his share of the partnership stock and effects, or who should become bankrupt or insolvent, or should permit any part of the partnership property to be taken in execution for his separate debt. *Held*, that a partner was not debarred, by the said articles, from giving a warrant of attorney, and that it was only in case it produced a certain effect, that his copartners were empowered to determine the partnership. Mills *v.* Osborne, 7 Sim. 37.

(*q*) Where one partner gave his son a power of attorney "to act on his behalf in dissolving the partnership, with authority to appoint any other person, as he might see fit," it was *held*, that this gave the son power to submit the account to arbitration. Henley *v.* Soper, 8 B. & C. 16. [Such an agreement to refer will be strictly confined to the special matters of reference. De Pusey *v.* Du Pont, 1 Del. Ch. 82.]

(*r*) By section 11th of the Common-Law Procedure Act, 1854 (17 & 18 Vict. ch. 125), if the parties to an instrument, in writing, have agreed to refer to arbitration any existing or future differences between them, a court or judge may, at discretion, upon application of the defendants or any of them, stay proceedings in an action commenced by any of the parties, against any or all the rest, in respect of the matters so agreed to be referred, if there is no sufficient reason why such matters should not be referred according to the agreement. See Russell *v.* Pellegrini, 6 Ellis & B. (Q. B.) (88 Eng. Com. L.) 1020, 38 Eng. L. & Eq. 99; Wallis *v.* Hirsch, 1 C. B. N. S. (87 Eng. Com. L.) 416, 38

tion, (*s*) and for reasons which may * operate upon * 248
the courts of this country when the question shall

Eng. L. & Eq. 210. It is to be observed, that this statute does not have the effect of making a covenant to refer a good plea in bar in an action at law upon the subject-matter agreed to be referred. See Livingston *v.* Ralli, *supra.*

(*s*) The general principle, applicable to provisions of this character, has certainly been, until quite recently, that no mere agreement to refer a controversy to arbitration will be allowed to oust the proper courts of their jurisdiction. Thompson *v.* Charnock, 8 T. R. 139; Contee *v.* Dawson, 2 Bland, 264; Hill *v.* Hollister, 1 Wilson, 129. See Allegre *v.* Insurance Company, 6 Harris & J. 413; Randel *v.* Chesapeake, &c., Canal Co., 1 Harring. (Del.) 233, 275; Gray *v.* Wilson, 4 Watts, 39; Stone *v.* Dennis, 3 Port. 231; Thomas *v.* Fredericks, 10 Q. B. 775; Haggart *v.* Morgan, 4 Sandf. 198; Frink *v.* Ryan, 3 Scam. 324. Hence, it has been considered very doubtful whether an action would lie between partners for the breach of a covenant to refer partnership disputes to arbitration. Tattersall *v.* Groote, 2 B. & P. 131; Gray *v.* Wilson, 4 Watts, 41.

But this doubt may be considered as to a great extent removed (at least as far as the English courts are concerned) by a late decision in the Court of Queen's Bench, Livingston *v.* Ralli, 5 Ellis & B. (Q. B.) (85 Eng. Com. L.) 132, 30 Eng. L. & Eq. 279. Lord Campbell, C. J., there said: "It is clear, on principle, that an action will lie for the breach of an agreement to refer. There is an express promise, and abundant consideration for the promise. Such an action is not contrary to any principle of law or to public policy; it is most reasonable and just that parties should be at liberty to introduce into their contract a stipulation that, if any difference arises, it should be referred to arbitration. It would be a great infringement on the liberty of the subject, if he were not to be permitted to refer a question to a domestic tribunal. Then, what authority is there to the contrary? Lord Eldon, one of the greatest of judges, seems to have entertained a doubt, though I do not find any decision by him upon the point. But since I have known Westminster Hall, the opinion has been that such an action is maintainable." The distinction is between bringing an action upon the agreement to refer, and pleading that agreement in bar to an action upon the subject agreed to be referred. In this latter case (though not in the former), the doctrine applies, that the courts of law cannot be divested of their jurisdiction by an agreement to refer; and hence such a plea is not a good plea in bar to the action. Wood *v.* The Copper Miners' Co., 17 C. B. (84 Eng. Com. L.) 561, 34 Eng. L. & Eq. 405, per Williams, J.; Scott *v.* Avery, 5 House of Lords Cases, 811, 36 Eng. L. & Eq. 18, per Lord Chancellor Canworth; Thompson *v.* Charnock, *supra.* In Livingston *v.* Ralli, *supra,* Coleridge, J., said: "We should be ousting the court of its jurisdiction, if, where a party complains that an agreement is broken, the defendant was allowed to answer: 'You cannot go to the court, because it is an agreement to refer, and the court will not enforce such an agreement.' The fallacy seems to be in confounding the distinction between an action for refusing to concur in referring a difference, and an action upon the subject agreed to be referred. Setting up an agreement to refer, as a defence, is very different in effect from bringing an action upon the subject itself."

Another reason generally given why, for breach of covenant to refer, no action can be maintained, is the difficulty of directing a jury how to assess the damages; which in most instances, at least, would necessarily be merely nominal. Tattersall *v.* Groote, *supra;* Street *v.* Rigby, 6 Ves.

come before them hereafter. At present, we are not
* 249 aware of any * distinct adjudication which adopts and approves the recent English adjudication. If the parties choose to agree to an arbitration, then questions may arise as to the effect of an award; and these will be considered in a subsequent chapter.

The general powers of a majority of the partners we have already considered. If the articles give to a majority a power to bind the rest, this power may be protected so far as it is expressed, but will not be extended by implication or construction. It is necessarily confined to matters which occur in the conduct of the partnership business or interests. (*t*) A majority acting under such articles, may have no power, in case of difficulties, to sell out the whole concern, against the will of the minority. (*u*) But, in accordance with principles which we have already considered, the parties may, by long-continued acquiescence and recognition, justify a court of equity in sustaining a course of conduct on the part of the majority not authorized by the articles, and even perhaps prohibited by them. (*v*)

818; Mitchell *v.* Harris, 2 Ves. Jun. 134. "But that is not a reason why the action should not be maintained; because, though the damages may not be substantial, the matter in question may be very important." Coleridge, J., in Livingston *v.* Ralli, *supra*. *It seems*, moreover, that this objection as to the difficulty of calculating the damages would be of no force where the covenant to refer contained a clause fixing upon a certain sum, by way of liquidated damages for the breach, as was the usual course adopted in references to arbitration under the civil law. 2 Story Eq. § 1461. Thus, in Street *v.* Rigby, 6 Ves. 818, Lord Eldon said: "There are prudential ways of drawing these articles. There might have been an agreement for liquidated damages to enforce a specific performance, if an action could not produce sufficient damages, or equity would not entertain a bill for a specific performance." Stone *v.* Dennis, 3 Port. 239. See following subsection respecting provisions for damages in partnership articles.

(*t*) Glassington *v.* Thwaites, 1 Sim. & S. 131.

(*u*) Hence, where a partnership existed among a large number of persons in certain newspapers, under an agreement that it should be managed by a committee of five, and by general meetings, at which the vote of the majority was to be binding, with a provision that any one wishing to retire should first offer his share to the committee at a certain price, and, if they declined to buy, might sell it to any other person, — it was *held*, that the majority were not able to sell the whole concern without the consent of all; but that, where all but two were desirous of retiring, they might sell their own shares, without making an offer of them to the committee. Chapple *v.* Cadell, Jac. 537.

(*v*) Glassington *v.* Thwaites, 1 Sim. & S. 124, 131.

Very frequently the articles provide for the division of profits, and determine the proportion in which each partner takes his share. There is nothing to prevent their making any bargain on this subject that they see fit to make. Where they make none, it is certainly the general rule, both in law and equity, that the profits shall be shared equally among the partners. (*w*) But we should say that where, from inequality of shares in the concern, * or of contribution to it, coupled with * 250 other circumstances of a similar indication, it must be obvious that a different distribution was expected and intended, a court of equity might be expected to so order. (*x*)

10. *Of Provision for Damages for Misconduct of a Partner.*

Sometimes the articles provide that for some specified misconduct, or breach of agreement, the offending partner shall pay a certain defined sum, by way of liquidated damages. And this may bring up questions which belong not so much to the law of partnership as to the law of contracts. Whatsoever is, in fact, a penalty for wrong-doing, or default of any kind, whether it be called penalty or any thing else, is, both in law and in equity, cut down to an adequacy with the wrong done, so that it shall afford full compensation, and nothing more. At the same time, there may be wrongs anticipated, or at least provided for, of which it is difficult or impossible to determine, even when they occur, with any exactness, the amount of damage they cause. In such a case, parties may agree beforehand as to what shall be taken for the amount of damages, if that thing happens. This is to agree upon liquidated damages; and in such a case courts will support the agreement, provided

(*w*) Robinson *v.* Anderson, 20 Beav. 98, 7 De G., M. & G. 239; Webster *v.* Bray, 7 Hare, 159. See Gill *v.* Geyer, 15 Ohio, 399.

(*x*) "Whenever a partnership adopts a project, within the principles of their agreement, for the purpose of profit, it must be for the benefit of all the partners, in proportion to their respective interests in the concern." Per Sedgwick, J., in Gray *v.* Portland Bank, 3 Mass. 364. There a banking company had been incorporated with the privilege of creating a stock not less than one sum, nor greater than another. The company commenced business with the smaller capital, but afterwards voted to increase it to the largest. *Held*, that those who held the stock in the capital first raised had a right to subscribe for and hold the new stock *in proportion to their respective shares in the old.* See Raymond *v.* Putnam, 44 N. H. 160.

it is made in good faith, is reasonable and not oppressive in its nature, and the damages are not, in point of fact, excessive, or out of all due proportion to the damage actually sustained. (*y*) If, however, liquidated damages are agreed on even under that name, and the default to which they apply causes damages of an exact amount, or of an amount which can be
* 251 * exactly ascertained, the courts will often disregard the agreement, and, in some form, give only adequate compensation. (*z*)

If the agreement be one which, in fact and substance, determines beforehand damages for a default, of that kind that these damages ought to be so liquidated; and if, on the other hand, the sum is a reasonable one, — the court will sustain it as liquidated damages, even though these damages are called a penalty, or by no name whatever. (*a*) So, at least, a court of equity would decide. (*b*) And if courts of law were constrained to treat as a penalty what the parties so called, the effect would be the same; because this penalty would need no cutting down to make it adequate.

There is one rule on the subject of liquidated damages applicable to articles of partnership, and to all other contracts.

(*y*) See the principles upon this subject stated, and the cases collected, in 3 Pars. on Cont. 156–163, 5th ed.

(*z*) Orr *v.* Churchill, 1 H. Bl. 227, 232; Kemble *v.* Farren, 6 Bing. 141; Boys *v.* Ancell, 7 Scott, 364; Heard *v.* Bowers, 23 Pick. 455, 462; Gray *v.* Crosby, 18 Johns. 219, 226; Hoag *v.* McGinnis, 22 Wend. 163; Bagley *v.* Peddie, 5 Sandf. 192; Sessions *v.* Richmond, 1 R. I. 298, 303; Jordan *v.* Lewis, 2 Stew. 426; Mead *v.* Wheeler, 13 N. H. 353.

(*a*) See Lowe *v.* Peers, 4 Burr. 2225; Farrant *v.* Olmius, 3 B. & Ald. 692; Fletcher *v.* Dyche, 2 T. R. 32, 36; Birch *v.* Stephenson, 3 Taunt. 469; Denton *v.* Richmond, 1 Cromp. & M. 734; Duckworth *v.* Alison, 1 M. & W. 412; Leighton *v.* Wales, 3 id. 545; Crisdee *v.* Bolton, 3 Car. & P. 239; Legge *v.* Harlock, 12 Q. B. 1015; Price *v.* Green, 16 M. & W. 346; Galsworthy *v.* Strutt, 1 Exch. 659; Dakin *v.* Williams, 17 Wend. 447, 22 id. 201; Pearson *v.* Williams, 26 id. 630; Heard *v.* Bowers, 23 Pick. 455, 463; Mead *v.* Wheeler, 13 N. H. 351. "Whether the sum mentioned in an agreement to be paid for breach is to be treated as a penalty, or as liquidated and ascertained damages, is a question of law, to be decided by the judge upon a consideration of the whole instrument." Per Wilde, C. J., in Sainter *v.* Ferguson, 7 C. B. 727.

(*b*) If liquidated damages are legally due, equity will not relieve against them. East India Co. *v.* Blake, Finch, 117; Small *v.* Fitzwilliams, Prec. Ch. 102; Rolfe *v.* Peterson, 2 Bro. P. C. 436 (Dublin ed.); 6 id. 470. And if a lessee of land covenant that he will not plough a certain part of it, and that, if he do so, he will pay a certain sum per acre, equity will neither enjoin the covenantor from violating his covenant, nor relieve him from the agreed penalty, if he do violate it. Woodward *v.* Gyles, 2 Vern. 119.

No one bargain for liquidated damages is enforced by the courts, unless the damages agreed upon are for one distinct breach only; or, if for many, are payable only when all these breaches are committed, and they are such that the actual amount of damages thence resulting cannot be ascertained. If, for example, the articles enumerate many duties and many agreements, and it is agreed that, for any breach thereof, the offending party shall pay a certain sum of money, such a bargain would seldom or never be enforced. It puts all * the breaches on the same footing; it puts a breach * 252 of all on the same footing as a breach of any one; and it brings together breaches of which some may cause damages as ascertainable as the withholding a certain debt, while some are as incapable of exact estimate as the violation of a general promise of good conduct. (*c*)

11. *Of Provisions for Appropriations of Property to a Partner.*

If the partners choose to agree that certain items of property used by the firm, as the house or store occupied by them, or the fixtures, or implements, or other chattels which are not for sale or use, or even certain specified parts or portions of the goods or merchandise bought and sold, shall not belong to the common stock, but be owned by one or more of the partners, or by the whole of them, in severalty,—there is nothing to prevent such a bargain, and nothing to interfere with its force or operation among the partners themselves. (*d*) The agreement

(*c*) Astley *v.* Weldon, 2 B. & P. 346; Kemble *v.* Farren, 6 Bing. 141; Charrington *v.* Laing, id. 242; Boys *v.* Ancell, 7 Scott, 364; Davies *v.* Penton, 6 B. & C. 216; Galsworthy *v.* Strutt, 1 Exch. 659; Atkyns *v.* Kinnier, 4 id. 776; Shute *v.* Taylor, 5 Metc. 67; Baglie *v.* Peddie, 5 Sandf. 192; Beale *v.* Hayes, id. 640; Gower *v.* Saltmarsh, 11 Mo. 271; Carpenter *v.* Lockhart, 1 Cart. (Ind.) 434; Bright *v.* Rowland, 3 How. (Miss.) 398; Cheddick *v.* Marsh, 1 N. J. 463; Curry *v.* Larer, 7 Barr, 470. See particularly Galsworthy *v.* Strutt, Atkyns *v.* Kinnier, and Baglie *v.* Peddie, *supra*, as cases well exhibiting the modern English and American doctrines on this subject; and for the difference, if any, between them, see 3 Pars. on Cont. 157, 159, and notes, 5th ed.

(*d*) We have already seen that the contribution of one partner to the common stock, or even the contributions of all the partners, and thus the entire capital of the partnership, may consist exclusively of the use of property. The questions which arise upon the retirement, bankruptcy, &c., of partners, respecting the transmutation or conversion of joint property into separate property, and *vice versâ*, will be considered hereafter, when we treat of the dissolution of a firm by those means.

might give rise to conflicting rights, and to difficult questions of fact; but there is no rule which prevents their making it. When, however, such a bargain is considered with reference to the creditors of the firm, a different state of things arises. In case of the insolvency of such a firm, or of any firm, there are usually two classes of creditors: those to whom the copartnership, as such, is indebted; and those to whom the several
* 253 partners, or some of * them, are indebted. We shall presently see that, by an universal rule, founded on obvious justice, the creditors of the firm are exclusively entitled to all the assets of the firm, until their debts are paid, and that the law is tending to give the creditors of the separate partners an equally exclusive right to the separate or private property of the indebted partner. Now, can the respective rights of these classes of creditors be made dependent upon the pleasure or the bargains of the partnership? To a certain extent, this may be so; but it is not easy to draw the line exactly, and say where the power of the partners, in this respect, terminates. If by the original articles, or by any subsequent agreement, three men who enter into partnership, and transact business as A., B., & Co., contract with each that no part of their merchandise shall be or form a part of the common property of the firm, but that each partner shall own in severalty one-third part of every thing bought, and one-third of the proceeds of every thing sold; and if this firm should become insolvent, and the several and private creditors claim all the merchandise of the firm as liable to their processes under this contract, leaving nothing for the creditors of the firm, — no court would ever look with favor on such a claim. This is so obvious, that precisely this arrangement probably never was made, nor will be. But if, on the other hand, the partners agree that the house which one of them owns, and the whole firm use, shall remain the property of that one partner; or if they agree that this piece of property bought and paid for by the firm, and used by them, shall belong to one partner alone, and be charged to him, and that piece of property to another, — such arrangements, made in good faith, and when no insolvency was apprehended, and in themselves reasonable, would in all probability be sustained by the courts. But they would hesitate, we think, in going

farther. It is said by Justice Story, that "In partnership articles it is sometimes agreed that the real estate and fixtures belonging to the firm shall not be treated as partnership property, as between the partners; but that all the partners shall have a several and individual interest therein. In such cases, the interests of the partners will be treated throughout as their several and separate estate; and, of course, in cases of bankruptcy of the partners, it will be distributable to and among their separate creditors respectively, in * preference to their joint creditors." (*e*) A similar statement is made by Collyer. (*f*) The authorities cited go no farther than that real property, bought and paid for from the partnership funds, may be appropriated to one partner, and the price charged to him, and that a subsequent insolvency of the firm will not divest his separate title; or that real property, originally owned and held by one partner alone, may be, by agreement, used by the partnership, without becoming partnership property. (*g*) But we apprehend that the practical rule now would be, certainly in England, and probably in this country, that property, whether real or personal, which was bought by partnership funds, or put by a partner into partnership stock, either formally and technically, or actually and substantially, and in such a way that it is held forth to persons dealing with them as partnership property, could not be divested of this character and made private and several property, merely by an agreement of the partners; at least, not in respect to any parties who are not made acquainted with the agreement before trusting the firm.

* 254

12. *Of Provisions respecting the Name of the Firm.*

Articles almost always provide what shall be the name of the firm; this name and style may be, as we have seen, whatever the partners wish; (*gg*) and it should always be adhered to.

(*e*) Story on Part. § 205.

(*f*) Collyer on Part. § 217.

(*g*) Smith *v.* Smith, 5 Ves. 189; *Ex parte* Smith, 3 Madd. 63. We shall have occasion to consider these and other analogous cases at large when we come to treat of the real estate of a firm, and of the rights of joint and separate creditors upon the dissolution of a firm by bankruptcy. (See *post*, ch. 11, and ch. 15, § 4.)

(*gg*) Crawford *v.* Collins, 45 Barb. 269.

If any partner uses any other name to designate the firm, it is, in fact, a breach of this contract; and, if any injury results from it, he would be responsible to those who suffered, whether they were his copartners or other persons.(*h*) It is, however,
* 255 not very * unusual, in this country, to find the long name of a firm shortened in practice; Christian names are dropped, or other changes introduced, to make the name of the firm easier to write or to speak. Such a change being made so often, so publicly, and by such persons, that the sanction of the firm may be implied, becomes their legal name; and the firm is bound by it, as they are not by any name that is not strictly their own, unless it be so sanctioned. (*i*) If the firm have adopted, as its proper name and style, John Smith & Thomas Brown, neither Smith & Brown, nor John Smith & Co., nor John Smith for self and partner, bind the firm, nor create a partnership debt which is to be paid from partnership assets, unless the peculiar circumstances of the case, in some way, make that *another* name of the firm. For a firm may have two names. It is not very uncommon for a partnership to use one name in one place and another name in another; or one name in one branch of business, or one class of transactions, as in buying or selling, or conveying, and another in a different class, as for excepting, signing, or indorsing negotiable paper. (*j*) But it would be a lax and dangerous practice to use two or more ways of naming the firm, indiscriminately, in all business.

(*h*) Marshall *v.* Colman, 2 Jac. & W. 268. In this case, Lord Eldon said: "I have no difficulty in saying, that where the members of a partnership contract by covenant that the firm shall be A., B., C., & D., that it is a breach of that covenant for A. to sign those instruments to which the covenant refers in the name of A. & Co.; but it is no less a breach of that covenant for D. to sign his own name, adding 'for self and partners,' because by these words it can no more be known who are his partners than by the word 'Co.'" And the plaintiff's bill complaining that certain of his partners (defendants) had entered into contracts and engagements for the firm by a name shorter than that provided for in the articles, and praying for an injunction to restrain them from so doing, the Lord Chancellor, though he refused the motion, said: "These gentlemen will do well (if they mean to protect themselves from the interference of this court) to use all the names in the concern: they must do that, or the court will be under the necessity of awarding an injunction, or dissolving the partnership." We have already had occasion to consider at large the name which a firm may adopt, and by which one partner may bind it. The right of a surviving partner to use the name of the old firm will be treated of hereafter.

(*i*) See *ante*, p. * 125, et seq.

(*j*) Williamson *v.* Johnson, 1 B. & C. 146; *ante*, p. * 125, et seq.

In New York, the use of fictitious names is prohibited by statute; and the designation "& Company," or "& Co.," must represent an actual partner or partners, other than those whose names are stated. (*k*)

Where the partnership name is not agreed upon in articles, and is written, that which is used in keeping books and accounts, upon bills of parcels, or on negotiable paper, especially if it is generally known, becomes the partnership name. (*l*)

SECTION VIII.

OF THE RIGHTS OF PROPERTY OF THE PARTNERS INTER SE.

1. *What constitutes Partnership Property.*

* It may be well to determine, in the first place, what * 256 is partnership property. In general, by this phrase is understood whatever belongs to the partnership. This may be real property; but the law of partnership, in respect to real property, is so much affected by the difference, both at common and statute law, between that property and personal property, and the system of rules, springing in part from their conflict and in part from their combination, is so peculiar, that it is thought best to consider the whole subject of the real property of partners in a separate chapter.

The personal property of a partnership consists mainly of the goods and merchandise which it buys and sells, or makes and sells. The question may arise, at what time property becomes partnership property. If it be sold to a partner in the firm, acting for the firm, it is, of course, partnership property as soon as the sale is complete; for by the sale it passes from the seller to the buyer, and there is no other buyer than the firm. But if goods are sold and delivered to one partner, without any knowledge on the part of the seller that he buys for the firm, and without any act of his indicating that he so buys, and the firm becomes insolvent before the goods are actually mingled with the partnership goods, the question may

(*k*) 3 Rev. Stat. N. Y. (ed. 1859) 978; Acts of 1833, ch. 281, §§ 1, 2.

(*l*) Le Roy *v.* Johnson, 2 Pet. 176; *ante*, p * 125, et seq.

arise, whether the partnership creditors, or the several creditors of that partner, take the goods. We apprehend this question must be answered by ascertaining, from all the circumstances, to whom the sale was actually made; for if the partner bought, in fact, as agent, although his agency was unknown, and even if it were, and continued to be, purposely concealed, we do not see that this circumstance should affect the rights of the creditors of either class.(*m*) Nor do we see how any presumption
*257 of law that the goods were bought for the firm * can arise; although if the goods were such as the firm dealt with, and such as that partner bought at other times for the firm, here would be good ground for argument that he so bought these goods. Still, as he might lawfully have bought them for himself, we should say that the burden of proof must be upon the creditors — whether of the firm or of a partner — who, in order to obtain the goods for their own benefit, must maintain an affirmative in respect to the title; and this may depend upon the form of the action, and the parties between whom it arises. Such questions are not very unfrequent in practice, but we do not know that they have often passed into adjudication; the reason being, that they are questions of fact rather than of law.

Not only all the goods and merchandise properly so called, but all chattels bought by the partnership, or otherwise coming to them, as their furniture, books, &c., are partnership property; and so also all bills of exchange and notes, or other evidence of debts, and all debts or accounts or balances, or other claims; and all shares in companies, or scrip, bought with partnership funds, or otherwise assigned to the partnership, and not transferred to the individual partners and charged in their accounts, would be regarded as partnership property.

It may be well to remark, that a gift or devise of property to a part of the partners in a firm, even if it be on account of a

(*m*) Saville *v.* Robertson, 4 T. R. 720; Post *v.* Kimberly, 9 Johns. 470; Gouthwaite *v.* Duckworth, 12 East, 421; Everitt *v.* Chapman, 6 Conn. 347. In these cases, and other analogous ones, the question when goods purchased by one partner become the property of the partnership, depends, in great measure, upon the answer to the question whether, at the time of their purchase, the partnership was actually in being, and capable of owning property, or whether it was only agreed upon, and dependent for its actual existence upon the happening of some future event.

loss sustained by the firm, or be otherwise a consequence of the partnership connection, does not make the property given or devised partnership property, or give any right to it or interest in it to the other partners. (*n*)

* Partners may agree to own the stock, as they may to * 258 share the profits, in any proportions that they please. And, if they make no agreement, there is a presumption of law in favor of an equality of interest in the case of the property, as there is of the profits. The authorities cited in the note will show that this presumption, though very general, is not quite universal; (*o*) and it may be * rebutted, both in * 259

(*n*) 2 Swanst. 571, 572. And where two American citizens residing at Baltimore, and a French subject residing at St. Domingo, were in partnership and owners of certain ships captured by British cruisers, and the commissioners, appointed under the 7th article of the treaty of commerce of 1794, between Great Britain and America, for awarding compensation to American subjects who had suffered losses by capture for which they could obtain no redress in the ordinary tribunals, awarded, in compensation of the ships of the partnership captured, certain sums to the two Americans, with express exclusion of the French citizen as an alien enemy, — it was *held*, that the sums so awarded were not partnership property, and that the creditors of the partnership had no claim on them, as against the separate creditors of the Americans. Campbell *v.* Mullett, 2 Swanst. 551. But *it seems*, that, if in a similar case of the seizure of partnership effects, instead of compensation made to one partner, his proportion of the joint property be restored to him, *in specie*, the goods so restored will be held never to have lost their character of partnership property, and will therefore be divisible among the several partners according to their respective interests. Thompson *v.* Ryan, id. 555. See Rowley *v.* Adams, 8 Jur. 994, 1000; Clarke *v.* Richards, 1 Younge & C. 351, 383. In this last case, it was *held*, that where a personal office or employment is purchased with the partnership funds for the benefit of the partnership, the partner in whose name it is purchased is not necessarily a trustee of the profits of the office for the other partners, after the term of the partnership had expired.

(*o*) Farr *v.* Johnson, 25 Ill. 522. The existence of this presumption has not, however, been uniformly admitted in the English law. See Peacock *v.* Peacock, 2 Camp. 45, and the opinion of Lords Brougham and Wynford, in Thompson *v.* Williamson, 7 Bligh, N. S. 432, 5 Wils. & Sh. 16. This case was heard on appeal to the House of Lords from the Scottish Court of Session, and was decided mainly with reference to the law of Scotland. But the Lords, whose opinions are reported, took occasion to examine the law of England on the point, and, mainly upon the authority of Peacock *v.* Peacock, came to the conclusion that it was not at variance with what they adjudged to be the law of Scotland. Their opinion was, that where parties are in partnership without agreement, it is not a necessary presumption of law that the profits are to be divided in equal shares. Lord Wynford said: "If I was to direct a jury, or was sitting in a situation to exercise an opinion both upon the law and the fact, I should say, if there be no evidence to guide my judgment, I will divide it equally; but I will not be content with merely written

relation to the property and to the profits; and, as we should say, more easily in respect to the property than as to the profits. (*p*) For if A., B., & C. combine their prop-

evidence, I will look at the circumstances, and I will infer as strongly from the circumstances the intentions of the parties as from the written evidence." And Lord Brougham: "If I was trying at *nisi prius* the question what proportion the partners in a concern were severally entitled to, I should be disposed to advise the jury, leaving the matter to them, that an equal division would be a convenient doctrine of fact, and form the ground for a convenient inference to be drawn, in the absence of other evidence: but that would only be supposing that there was no other evidence in the cause; if there was any other evidence that could be found to alter the proportions, that evidence must furnish the rule, and that would be an additional ground for saying, that it must be a presumption of fact and not of law." And even where there was no evidence, Lord Brougham stated, as the opinion of Lord Wynford, of one of the Chief Justices, and of himself, that a jury should in all cases be directed to take into consideration "the fairness of an equal division; but not discountenancing evidence, rather courting evidence, rather regretting that there was no evidence, and only having recourse to that presumption in the last resort, for want of evidence." See also the opinion of the Master of the Rolls, in Lake v. Gibson, 1 Eq. Cas. Abr. 291; Sharpe *v.* Cummins, 2 Dow. & L. 504. These are the principal, if not the only, common-law authorities, which are clearly at variance with the doctrine of the text. Mr. Justice Story, indeed, says [Story on Part. § 24, n. (3)]: "It is true, that, in the case of Thompson *v.* Williamson, a doubt was thrown upon this doctrine [the presumed equality of the shares of partners], as a doctrine of the common law, by Lord Wynford and Lord Brougham; but I cannot think that it is successfully maintained by the reasoning contained in their opinions. Each of these learned judges admitted on that occasion, that, if there is nothing to guide the judgment of the court to give unequal shares, there is no rule for them to go by, but to give in equal shares. What is this but affirming, that, in the absence of all controlling circumstances leading to a different conclusion, the presumption of law is, that the partners are to take in equal shares?" We conceive, however, that a consideration of the entire opinions of the two Lords in that case shows that, in their view, the question what proportions the partners in a concern are severally entitled to, is never, in the absence of special agreement, any thing but a question of fact to be passed upon by the jury. They both admit that there may be instances in which the inference may be made that the partners in a concern have equal shares. But, if we understand their views, this inference is not to be made by the court, but can only be drawn by the jury. That is, the presumption of equality of shares among partners is not a presumption of law, but a presumption of fact. And the question must always be submitted to the jury. And it is obvious, from the whole tendency and scope of the opinions of the two Lords, that, unless the question of the distribution of interest were presented in this simple form, "Given that A. & B. are partners; what are their shares?" they did not contemplate that the presumption of equal shares among partners, which they allowed to exist, could have any operation. "It is scarcely possible," says Lord Wynford, "for a case to occur in which there will not be circumstances which it is fit to submit to the consideration of a jury, and which would induce a jury to give in unequal shares."

(*p*) The presumption of equality of interest may be rebutted, not only by

erty * in very different proportions, it is still very possi- * 260
ble, and indeed very frequent, in fact, that he who brings less capital brings more skill or more labor, and that the profits are therefore equalized. But while the profits resulting from this mingling of money and labor and skill are equal, so far as refers to the stock alone, we should say that the law would listen favorably to all evidence and all circumstances which tended to preserve the same proportions of interest in the capital stock which originally existed. Practically, this question cannot often arise. If the firm be insolvent, its stock is all gone, and all questions of ownership disappear when there is nothing to own. Such questions, in practice, come only at dissolution, by death or otherwise; or when some withdrawal or diminution of stock is proposed. Then they will generally be determined by the articles; for they are seldom omitted when there is great inequality in the contributions to be made by the different partners. If not so determined, it might be that law or equity would presume that the same proportions of ownership and

proof of an express agreement between the parties to share unequally, but by evidence of any modes of dealing, or of any transactions, from which such a contract can be implied. See Stewart *v.* Forbes, 1 Mac. & G. 137, 146, the Lord Chancellor said: "The plaintiff's bill rests upon the supposition that, from 1830 to 1840, Sir Charles Forbes and the plaintiff were equal partners; and Peacock *v.* Peacock, 2 Camp. 45, 16 Ves. 55, 56, was relied on as a foundation for that assumption. In that case, it was properly *held*, that, in the absence of any contract between the parties, or any dealing from which a contract might be inferred, it would be assumed that the parties had carried on their business on terms of an equal partnership. That case has no application to the present, because there is, in this case, conclusive evidence, not from any form of contract, but from the books of the business and the dealings between the parties, that such were not the terms on which the parties carried on their business. An equal partnership implies not only an equal participation *de facto* in profits and loss, but a right in each partner to claim and insist on such participation. This is what the law has implied in the absence of all evidence of a contrary intention of the parties. But what would have been the decision in Peacock *v.* Peacock, if the books and accounts, instead of absolute silence as to the shares of the partners in each year, had described the shares to which the partners were entitled in the business, and had attributed to the plaintiff four-sixteenths only of the shares of the business? These entries are as conclusive of the rights of the parties as if they had been found prescribed in a regular contract." See Webster *v.* Bray, 7 Hare, 159. It is not to be assumed, however, that the annual stock taken by a partnership necessarily represents the interests of the several partners in the firm; but it may or may not do so, according to the purpose for which, and the mode in which, it is made up. Travis *v.* Milne, 9 Hare, 153.

interest continue which originally existed; and, certainly, comparatively slight evidence would suffice to establish this. Whether, in the absence of special agreement upon the point, any presumption exists, and what it is, and whether of law or of fact, and what are its grounds, and what its strength, must depend, not on the law of partnership alone, but on that law in connection with the principles of evidence. But notwithstanding some conflict, as indicated in the cases cited in the previous note, we are of opinion that the prevailing rule of law that partners are interested in stock and profits in equal proportions, in the absence of any evidence to the contrary, may be considered as pretty well settled both in England and this country. (*q*)

(*q*) Thompson *v.* Williamson, cited in preceding note, although the *dicta* respecting the English law, which it contains, are entitled to great respect, as the opinions of eminent judges, is yet expressly said by Lord Brougham to be decided as a question of Scottish law. And even as an adjudication under the law of Scotland, which is founded upon the civil law, it has been thought open to question. See Story on Part. § 24, and note. Of Peacock *v.* Peacock, which stands alone among the common-law authorities, Lord Eldon, who had directed the issue, said: "The result of the issue that was directed, appears to be extraordinary. The proposition being that the son was interested in some share, not exceeding a moiety, the jury in some way, upon the footing of a *quantum meruit*, held him entitled to a quarter. I have no conception how that principle can be applied to a partnership." Stewart *v.* Forbes, 1 Mac. & G. 137; Webster *v.* Bray, 7 Hare, 159; M'Gregor *v.* Bainbrigge, 7 id. 164, n. In this country, it never seems to have been controverted, that in the absence of any contract upon the subject, the partners were interested in equal proportions, however different or unequal their contributions to the joint concern. Gould *v.* Gould, 6 Wend. 263; Taylor *v.* Taylor, 2 Murph. 70; Conwell *v.* Sandidge, 5 Dana, 210, 211; Lee *v.* Lashbrooke, 8 id. 214; Jones *v.* Jones, 1 Ired. Eq. 332; Honore *v.* Colmesnil, 1 J. J. Marsh. 506; Turnipseed *v.* Goodwin, 9 Ala. 372; Donelson *v.* Posey, 13 id. 752, 772; Stein *v.* Robertson, 30 id. 286, 292; Roach *v.* Perry, 16 Ill. 37. So, if a shipment is made to partners, they are held by the Prize Court to take in equal moieties, unless upon the original papers a different proportion appears. The San Jose Indiano, 2 Gallis. 268, 303.

It is to be observed that, in the above cases, no distinction is taken between the property and the profits of a firm, as regards the application of the presumption of an equality of interest between the partners. In Farrar *v.* Beswick, 1 Moody & R. 527, the presumption that the several partners were equally interested, was applied as to the stock only; so also, in Gould *v.* Gould, *supra;* Donelson *v.* Posey, 13 Ala. 772. See Penny *v.* Black, 9 Bosw. 310.

2. *Of the Good-Will, and of Trade-Marks, Copyrights, and Patent-Rights.*

* There is yet another thing which is certainly, in some respects, partnership property, but which it is not so easy to define; and this is the good-will of the firm. A distinction has been taken, in this respect, between the interest of a partnership resting on the contracts of the firm with a third party, and that which has no such foundation. (*r*) We have much doubt, however, whether this distinction rests on good authority, or good reason. The claims or interests of the partnership arising from contracts made with them, or on their vested and exclusive rights, however acquired, seem to be excluded from the meaning of "good-will;" for the only proper signification of the word must be, that benefit or advantage which rests only on the *good-will*, or kind and friendly feeling of others, and which, of course, can be wholly lost without giving rise to any legal right, or ground of complaint. This simple meaning of "good-will" we take to be the true technical and legal meaning of the word. Lord Eldon defined * this about as well as it can be defined, when he said, that "the good-will of a trade is nothing more than the probability that the old customers will resort to the old place;" although this definition is open to the objection

* 261

* 262

(*r*) Lord Eldon has thus stated and explained this distinction: "Where two persons are jointly interested in trade, and one, by purchase, becomes sole owner of the partnership property, the very circumstance of sole ownership gives him an advantage beyond the actual value of the property, and which may be pointed out as a distinct benefit essentially connected with the sole ownership. In the case of the trade of a nursery-man, for instance, the mere knowledge of the fact that he is sole owner of the property, and in the sole and exclusive management of the concern, gives him an advantage which the other partner, supposing him to carry on the same trade, with other property not the partnership property, would not possess. In that sense, therefore, the good-will of a trade follows from and is connected with the fact of sole ownership. There is another way in which the good-will of a trade may be rendered still more valuable: as by certain stipulations entered into between the parties at the time of the one relinquishing his share in the business; as by inserting a condition that the withdrawing partner shall not carry on the same trade any longer, or that he shall not carry it on within a certain distance of the place where the partnership trade was carried on, and where the continuing partner is to carry it on upon his own sole and separate account." Kennedy *v.* Lee, 3 Mer. 452.

that it localizes that interest which we call good-will, and makes it altogether dependent upon place, and wholly independent of persons. (*s*) This is, nevertheless, an exact statement of the legal meaning of good-will. It is a hope or expectation, which may be reasonable and strong, and may rest upon a state of things that has grown up through a long period, and been promoted by large expenditures of money. And it may be worth all the money it has cost, and a great deal more; but it is, after all, nothing more than a hope, grounded upon a probability. There is some difficulty, no doubt, in treating this hope as property; but if that which is, in fact, a valuable interest, were not treated as one, injustice would be done, and therefore both law and equity treat the good-will of a business as a valuable pecuniary interest, (*t*) although it differs in important respects from tangible property, or legal choses in action. Thus, it cannot be valued as a separate property, or, at least, is not by the law, although it often is by parties themselves, (*u*) and might be so valued without difficulty in equity, although it is said that a contract for the sale of a good-will will not be enforced in equity. (*v*)

* 263 * The executor of a deceased partner can realize the share of the deceased in the good-will, only when he can compel a sale of the stock and premises, and then the good-will goes with them. (*w*) For, as a general rule, by the convey-

(*s*) Cruttwell *v.* Lye, 17 Ves. 335, 346. This definition, as we have above intimated, makes good-will local, and an incident of *the place where* business has been carried on, and not of the *persons by whom* it has been conducted. It is in this sense, only, that good-will is recognized by the law as a pecuniary interest. Hence the sale of a trade with the good-will leaves the vendor at liberty to set up the same trade in any other situation. Shackle *v.* Baker, 14 Ves. 468; Harrison *v.* Gardner, 2 Madd. 198, 219; Cruttwell *v.* Lye, 1 Rose, 123; 16 Am. Jur. 87, 92.

(*t*) Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 68; Williams *v.* Wilson, 4 Sandf. Ch. 379. As to how far a name which the firm have used in their business, and have made valuable, may be treated as of the nature of good-will, see *post*.

(*u*) Harrison *v.* Gardner, 2 Madd. 198.

(*v*) In Baxter *v.* Connoly, 1 Jac & W. 580, Lord Eldon said: "The court certainly will not execute a contract for the sale of a good-will: at the same time, it will not enjoin against any proceeding at law under such an agreement. Suppose, for instance, there is a contract for the good-will of a shop; it cannot be conveyed, and the court would say, Go and make what you can of it at law; if you can recover, very well, we won't prevent you; if you cannot, very well again, we won't assist you." Coslake *v.* Till, 1 Russ. 376, 378; Bozon *v.* Farlow, 1 Mer. 459. See Shackle *v.* Baker, 14 Ves. 468.

(*w*) Crawshay *v.* Collins, 15 Ves. 224,

ance of a shop or store, the good-will of the business carried on in it passes, although nothing is said about the good-will. (*x*) And if an executor cannot compel a sale of the premises, or, as it seems, if the premises are not, in fact, sold, the executor gets no advantage from the good-will, for that remains entirely with the surviving partners who carry on the same business in the same place. And if the executor attempts to use the name of the old firm in such wise as to secure to himself a portion of the good-will, it is said that he will be restrained by injunction. (*y*) But this can only apply so far as to prevent fraud on his part. If he continues the same business in another place, and advertise the fact that he is the executor of a partner, and carries it on with the same facilities and the same advantage to customers as was done by the old partnership, there is certainly no right in the surviving partners, who have paid nothing for the good-will, to prevent his doing so.

From these and similar difficulties, it has been said by high authorities that the good-will of a business is not partnership property, and remains wholly with the surviving partners. (*z*) We cannot but think, however, that an American decision affirming it to be partnership property, and capable of division, * rests on better reason. (*a*) And it would * 264 always be in the power of equity to ascertain its value,

227; Featherstonhaugh *v.* Fenwick, 17 id. 309, 312; Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 70.

(*x*) Chissam *v.* Dewes, 5 Russ. 29. See Kennedy *v.* Lee, 3 Meriv. 441, 452.

(*y*) Lewis *v.* Langdon, 7 Sim. 421. See Staats *v.* Howlett, 4 Denio, 559. [A retired partner, who sets up in business on his own account, will not be allowed so to advertise his former connection as to lead the public to believe that he is carrying on the business of the old firm. Hookham *v.* Pottage, L. R. 8 Ch. 91. Nor will a partner continuing the business be allowed to use the old firm name, to the prejudice of the retiring partner. McGowan *v.* McGowan, 22 Ohio St. 370. See also, as to use of firm name after dissolution, Benninger *v.* Clarke, 10 Abb. (N. Y.) Pr. n. s. 264.]

(*z*) In Hammond *v.* Douglas, 5 Ves. 539, the Lord Chancellor, Loughborough, "was clearly of opinion, that upon a partnership without articles the good-will survives; and a sale of it cannot be compelled by the representatives of the deceased partner, being the right of the survivor, which the law gives him to carry on the trade. It is not partnership stock of which the executor may compel a division." See Lewis *v.* Langdon, 7 Sim. 421. Chancellor Kent gives his sanction to this doctrine; 3 Kent Comm. [64]; and though it was doubted by Lord Eldon in Crawshay *v.* Collins, 15 Ves. 224, 227, yet this doubt has been considered overruled by the case of Lewis *v.* Langdon, *supra*.

(*a*) Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 68.

by evidence offered to a Master; or, at least, if there can be no agreement, by a sale of the good-will, and if that be inseparable from the shop or store, then that might be sold also, for this, if for no other reason. It has been held, in another American case, that a receiver of a partnership may be directed by the court to carry the business on, in order to preserve a valuable good-will. (*b*)

A distinction has been taken in this respect between the good-will of a partnership in trade, and that of a professional partnership. Lawyers or physicians may become partners; but the good-will attached to such a firm must be considered more as a personal than as a local thing. (*c*) It is not a probability that the old customers will go to the old place, but to the same persons, wherever they may be. And, if one died, it would be very hard — as has been said by an English equity judge — to require the other to give up his business and sell out, in order to determine the value of the good-will. (*d*) And probably the business-office which successful lawyers or physicians had occupied would bring but little more for their occupancy. There are instances which might fall between these in this respect. The business of an apothecary, in this country, is almost altogether commercial. In England, it is,
* 265 in great proportion, the business of a medical * prac-

(*b*) Marten *v.* Van Schaick, 4 Paige, 479. The court directed the receiver to carry on the business in this case; the very thing which was considered by the Vice-Chancellor in 7 Sim. 421, to be beyond the power of equity, and therefore to show that the good-will of a business could not belong to the firm, but remained to the survivor. See Williams *v.* Wilson, 4 Sandf. Ch. 379.

(*c*) Though, for the reason stated in the text, there is properly speaking no good-will belonging to professional partnerships, yet it is very common for attorneys, solicitors, physicians, &c., to agree, upon selling out, to secure their customers to those who succeed them. The policy of sanctioning agreements of this character has been doubted. But their validity is not questioned; though equity, it seems, will not specifically enforce them. Candler *v.* Candler, Jac. 231; Whittaker *v.* Howe, 3 Beav. 389, 393; Bozon *v.* Farlow, 1 Meriv. 459.

(*d*) Farr *v.* Pearce, 3 Madd. 78. Here, Farr & Pearce had been partners in the business of surgeon, apothecary, &c., under articles. Sir John Leach, V. C., said: "When such partnerships determine, unless there be stipulations to the contrary, each must be at liberty to continue his own exertions; and, where the determination is by the death of one, the right of the survivor cannot be affected. Such partnerships are very different from commercial partnerships." Another case is mentioned by Collyer as having been decided on the same principle. Spicer *v.* James, Rolls, M. T. 1830; Collyer on Part. § 164.

titioner. Here, therefore, the good-will might be treated as a commercial one; there, as a professional one. (*e*)

3. *Of the Trade Name.*

The question of the right to use a trade name has come before the courts, and it would seem that this could not be treated as of the nature of good-will, or as a valuable interest which the court could recognize and protect, mainly from the want of adequate power in a court. (*f*) But of late years new and excellent principles and rules have been adopted in England and in this country in respect to trade-marks. They are considered property, so far that parties using them falsely and injuriously are now certainly liable in damages to those who have a right to them, and equity will restrain this unlawful use. (*g*) We cannot but think that this right partakes so much of the nature of good-will that it will be included within that term, or otherwise recognized and protected by courts, if they have power to do so. (*h*) Of copyrights and patent-rights no question is made: they often form a valuable portion of the stock of bookselling and other commercial partnerships. (*i*)

It is said in some cases, and in text-books of high authority, that each partner has a lien on the common property,

(*e*) See Farr *v.* Pearce, in preceding note. In 16 Am. Jur. 87, the good-will of a newspaper establishment is considered to stand on the same footing as the good-will of a professional business. See Keene *v.* Harris, cited in 17 Ves. 338, 342. And in Holden *v.* M'Makin, 1 Pars. Sel. Cas. 270, 282, it is held that a newspaper is subject to the same rule as a commercial partnership.

(*f*) See Lewis *v.* Langdon, 7 Sim. 421; Webster *v.* Webster, 3 Swanst. 490.

(*g*) The right and property of a firm to and in a trade-mark are of course the same as that of an individual. The following recent cases upon the general subject may be consulted as exemplifying the proposition of the text. Taylor *v.* Carpenter, 2 Woodb. & M. 1, 11 Paige, 292, 2 Sandf. Ch. 603, 3 Story, 458; Amoskeag Manufacturing Co *v.* Spear, 2 Sandf. 599; Coats *v.* Holbrook, 2 Sandf. Ch. 586; Knott *v.* Morgan, 2 Keene, 213; Rodgers *v.* Nowell, 5 C. B. 109, 17 Eng. L. & Eq. 83, 145; Farina *v.* Silverlock, 39 Eng. L. & Eq. 514. The cases are well collected and examined in note to 2 Kent (9th ed.), [372]. See also 6 West. L. J. 337.

(*h*) In Hine *v.* Lart, 10 Jur. 106, it seems to have been considered by the court that a trade-mark was partnership property. See Lewis *v.* Langdon, 7 Sim. 421; *ante*, p. * 265 and notes. [Equity will not decree the sale of a partner's interest in a firm brand or trade-mark, its value being too insubstantial upon which to set a value. Taylor *v.* Bemis, 4 Biss. U. S. C. Ct. 406.]

(*i*) Parkhurst *v.* Kinsman, 1 Blatchf. C. C. 488, 495; Penniman *v.* Munson, 26 Vt. 164; Lovell *v.* Hicks, 2 Younge & C. 481.

*266 first, to * secure the payment of the common debts, for which each partner is liable *in solido*, and then to secure to him his own share in the partnership property, after the debts are all paid. And it is also said that this lien may be followed out, and made to attach, in some cases, to the proceeds of partnership property, which has been wrongfully sold. We should consider this topic here, but it is closely connected with another principle generally stated with it; namely, that it is through this lien that the right of creditors of the partnership to the property of the partnership, as pledged to the payment of their debts, is to be worked out.

This is much the most important aspect of this topic of lien, in a practical point of view; and, regarding the doctrine of lien as of more moment to the creditors than to the partners themselves, we defer the consideration of it until we treat of the rights and remedies of third persons against the firm. And then we shall state our dissent from some of the views frequently expressed of this lien, and endeavor to show how it needs to be qualified or modified before it can harmonize with the law of partnership, or the general law-merchant.

CHAPTER VIII.

OF THE REMEDIES OF PARTNERS INTER SE.

SECTION I.

GENERAL CONSIDERATIONS.

THE relation of partners, and the legal *status* of a partnership, are peculiar; and the remedies which each partner has against another are equally so, and it is sometimes difficult to define them. A partnership is not a corporation, nor a legal person; and yet the common law yields so far to the reasons and necessities of the law-merchant as to consider the partnership as a *quasi* corporation, or, at least, to recognize it as having some kind and measure of personality. Perhaps it might be better if our law, like the Scotch law (founded on the civil law), carried this personality so much farther as to permit actions by or against the firm, without reference to the individual partners. (*a*) In Illinois, it has been held that, under the attachment act of that State, a copartnership may be sued by their firm name, and a garnishee proceeded against in the same way. (*aa*) The same power is given by statute in some other States. (*aaa*) In some instances, it might be useful and safe to permit (as the Scotch law permits) (*b*) a partner to proceed against a partnership, or the firm against a partner, much as may be done in the case of a corporation. Nothing of that kind is known to the common law; and it may be that equity has now established principles and methods which practically answer as well. But in equity an action to recover for money misappropriated by a partner should make the defaulting partner a party. (*bb*) In this country, where equity and

(*a*) 2 Bell Comm. Bk. 7, V. p. 510.

(*aa*) U. S. Express Co. *v.* Bedbury, 34 Ill. 459.

(*aaa*) Stuart *v.* Corning, 32 Conn. 105.

(*b*) Ibid.

(*bb*) Atkinson *v.* Mackreth, Law Rep. 2 Eq. 570.

law have, in many States, approached closely together, and seem to be tending towards unity, there may be still less need of any remedies in addition to those now made use of. But many questions in the use of these remedies certainly demand better and more certain answers than can now be made. They, however, can be given authoritatively only by adjudication, or by legislation.

* 268 * As a general rule, the law will not take cognizance of questions which relate to the partnership between living partners. (*c*) The reasons for this are substantial and of much weight. One is, that if a partner calls on another to acknowledge or satisfy any claim in which the partnership is interested, the plaintiff will either prevail and recover damages to which he must himself eventually contribute, or be defeated, and perhaps be obliged to pay to the defendant something which gives the plaintiff a right to call at once on the defendant to refund a part of what he pays. (*d*) The second reason is little more than a development or consequence of the first. It is, that no partner has a several and personal claim on any other partner for any matter in which the partnership is interested, because neither can the partners be separated, — all being interested, both as plaintiffs and as defendants, — nor can any claim or item of claim be separated from the other inter-

(*c*) Or as the rule is laid down by Abbott, C. J.: "One partner cannot maintain an action against his copartner for work and labor performed, or money expended on account of the partnership." Holmes *v.* Higgins, 1 B. & C. 76. It is unnecessary to adduce here the numerous authorities upon this point; for, as is said hereafter, the whole of this section consists simply in a statement of the exceptions to the general rule. We have already seen that, for his personal services in the affairs of the partnership, as a general rule, no partner is entitled to compensation, even as an item of account between the partners. For his advances and outlays in behalf of the firm, each partner is, indeed, entitled to the proper credits, whenever the partnership accounts are made up. But we shall see that he can maintain no action against the partnership for the amount of his expenditures, because he cannot be both plaintiff and defendant of record; nor against his copartners, for the reason stated hereafter in the text, that, until an account of the partnership concerns is taken, it is impossible to tell whether he is really a debtor or creditor of the other partners. But, after a trial and verdict for the plaintiff, it is too late for the defendant to object that the subject-matter of the suit was a copartnership contract between him and the plaintiff. The objection should be made at the trial. Smith *v.* Allen, 18 Johns. 245. See Gomersall *v.* Gomersall, 14 Allen, 60; and Crottes *v.* Frigerio, 18 La. Ann. 283.

(*d*) Milburn *v.* Codd, 7 B. & C. 419, 421.

ests of the partnership. One partner may to-day pay much more or much less than the sum which would fall upon him to pay, in proportion either to the numbers of the partners, or to his share or interest in the concern. But yesterday he may have done just the reverse; and the charge or credit of yesterday must be brought into connection with the charge or credit of to-day, before it can be ascertained whether he has paid too much or too little, and therefore whether he may claim of the other partners, or they of him. But, to settle this question finally and justly, the charges and credits of all other days, and not only so, but of all * the other part- * 269 ners, must be taken into consideration, before it can be ascertained whether the plaintiff has a valid claim against the defendant. (*e*)

The objections to the cognizance by law of the claim of a partner, against a partner on partnership account, resolve themselves into this: The balance against every partner, on partnership account, is, like every other debt to the partnership, a part of the stock or property of the partnership; all this is first bound to the debts of the firm, and, after these are paid, it all belongs to the partners severally, in due proportion. No one, therefore, can make good his separate claim or title to one of these debts or balances, any more than he can to the separate debt of any creditor of the firm or a severed portion of the merchandise. There is, indeed, no separate claim until adjustment of all the claims; and therefore no ground for maintaining such a suit at law.

It may be said that there is, in fact, in each partner a kind of latent but vested interest in his share, and a proportionate claim against every partner who withholds his share; and that the process of account and adjustment gives no title, but only ascertains its extent and measure. Something like this is true; and equity proceeds on principles not very different. But the common law cannot, for the reason that it has no methods nor processes by which it could cause, or regulate, or

(*e*) Lord Chancellor Cottenham explains the disability of partners to sue each other in Richardson *v.* Bank of England, 4 Mylne & C. 171, 172. See Francisco *v.* Fitch, 25 Barb. 130; Morin *v.* Martin, 25 Mo. 360; Hammond *v.* Hammond, 20 Ga. 556; Wiggin *v.* Cummings, 8 Allen, 153.

recognize the account and adjustment necessary to define the personal claim of each partner. Certainly it cannot do this as easily and as completely as equity can do it; and this is substantially the reason why equity has jurisdiction over all cases of this kind. (*f*)

* 270 *The limits between legal and equitable jurisdiction in relation to questions arising under partnership are, on the whole, sufficiently well defined, although there are some questions upon which an unfortunate degree of obscurity still rests. We will, in the first place, consider those cases of which courts of law take cognizance, and then those which are referred to equity.

SECTION II.

OF QUESTIONS BETWEEN PARTNERS OF WHICH COURTS OF LAW TAKE COGNIZANCE.

1. *Of Demands Distinct from the Affairs of the Partnership.*

While the accounts of the partnership remain unadjusted, one partner cannot recover of the other any money received on

(*f*) "It is a general rule, that between partners, whether they are so in general or for a particular transaction only, no account can be taken at law." Per Abbott, C. J., in Borill *v.* Hammond, 6 B. & C. 149, 151. And in Rogers *v.* Rogers, 1 Hall, 391, it was expressly *held*, that a court of law cannot take jurisdiction of accounts between partners. See Harvey *v.* Crickett, 5 Maule & S. 336, 340; Smith *v.* Barrow, 2 T. R. 476, 478; Nugent *v.* Locke, 4 Cal. 318; McKnight *v.* McCutchen, 27 Mo. 436. In De Tastet *v.* Shaw, 1 B. & Ald. 664, 669, Lord Ellenborough, C. J., delivering the opinion of the court, said: "The only mode in which a fact can be controverted in an action at law, namely, by taking an issue to be tried by a jury, is impracticable in the present case: because the debt constitutes an item in a partnership account; and the partnership account must be taken in order to ascertain how much was due at the execution of the deed, and whether the sum has been reduced in any and what degree by the intermediate gains of the partnership business. Such an account cannot be taken by a jury, and consequently no issue could be taken on the debt on which the defendants rely." "The short objection to this application is," said Chambre, J., "that the court cannot direct a partnership account to be taken, without assuming a jurisdiction that does not belong to it." Chapman *v.* Koops, 3 B. & P. 289; Parker *v.* Pistor, id. 288. See Judd *v.* Harris, 6 Vt. 185; Spear *v.* Newell, 13 id. 288; Beach *v.* Hotchkiss, 2 Conn. 425.

The action of account may be brought between partners wherever that action is in use; but it seems properly applicable only where the partnership has come to an end. 1 Story Eq. §§ 659-665.

partnership account. (*ff*) But partners may sue their partners, or be sued by them, on any matter not connected with the partnership, as freely, and in precisely the same way, as if they were not partners; for the plain reason, that, outside of the partnership, they are not partners. Nor does it make any difference whether this personal and separate contract or debt becomes afterwards connected with the partnership, or is so at the time in the intention of the parties, if it be not on account of the partnership, so as to involve all the partners. Thus, if one partner, who has taken more than his proportion from the partnership, and therefore has a large debit against him on the partnership books, wishes to reduce this debit, and borrows money from another partner, confessedly to be paid to the partnership in reduction of this debit, the borrower is bound personally to the lender, and the * lender can sue * 271 personally the borrower. And, if a partner sues a partner on any independent and several indebtedness, the defendant cannot set off or recoup any alleged balance which he claims that he should have against the plaintiff, on partnership account, when that account shall be hereafter settled and balanced. (*g*)

So, too, a partner can sue a partner on any contract or transaction arising before the partnership, although referring to the partnership. (*h*) Thus, if one proposed partner borrow money of another, to be advanced by the borrower as a part of his contribution to the stock of the partnership, the borrower is liable

(*ff*) Smith *v.* Smith, 33 Mo. 557. [Though one partner give another his promissory note, if it be before and in aid of settlement, and may not be found to be due on settlement, no suit at law between the partners can be founded on it. Buell *v.* Cole, 54 Barb. (N. Y.) 353. The neglect, however, of a defendant to enjoin a suit at law against him by a copartner, in respect to their partnership dealings, does not prevent his maintaining a bill for an account after judgment in the suit, and offsetting against it so much as upon settlement shall be found just. Gregg *v.* Brower, 67 Ill. 525.]

(*g*) Ives *v.* Miller, 19 Barb. 196. See Roberts *v.* Fitler, 13 Penn. St. 265; Molony *v.* Davis, 48 id. 512.

(*h*) Goddard *v.* Hodges, 3 Tyrw. 209. Where the plaintiff contracted to do certain work for a joint-stock company for a given sum, and afterwards caused his name to be inserted in the books of the company as a holder of shares therein, — *held*, that this did not affect his right to sue the company in respect of the prior contract. Lucas *v.* Beach, 1 Scott N. R. 350, 1 Man. & G. 417. See Holmes *v.* Higgins, 1 B. & C. 74; Fox *v.* Clifton, 6 Bing. 776; Howell *v.* Brodie, 6 Bing. N. C. 44; Cheny *v.* Clark, 3 Vt. 431; Currier *v.* Webster, 45 N. H. 226.

at law personally to the lender, whether the money so borrowed is so used and applied by the borrower or not. (*i*)

So, too, if the contract or transaction arise after the termination of the partnership, although it have a reference to
*272 it, an action at *law is still maintainable. (*j*) Thus,

(*i*) Helme *v.* Smith, 7 Bing. 714, opinion of Parke, J.; *Ex parte* Notley, 1 Mont. & A. 46; Elegie *v.* Webster, 5 M. & W. 518; Bumpass *v.* Webb, 1 Stewart, 19; Scott *v.* Campbell, 30 Ala. 728; Duncan *v.* Lyon, 3 Johns. Ch. 362; Bailey *v.* Starke, 1 Eng. 191; Biernan *v.* Brashes, 14 Mo. 24; French *v.* Styring, 2 C. B. N. S. 357, 40 Eng. L. & Eq. 274. See Collamer *v.* Foster, 26 Vt. 754; Pool *v.* Delancy, 11 Mo. 570; Currier *v.* Rowe, 46 N. H. 72.

The above cases show that if A., entering into partnership with B., at B.'s request advances for him the amount of capital B. has agreed to contribute to the joint funds, this is a loan of money by A. to B., and constitutes a debt, arising previous to the partnership, which A. may recover at law pending the partnership, and though the partnership accounts are unsettled. See also Williams *v.* Henshaw, 11 Pick. 84; [Crater *v.* Binninger, 45 N. Y. 545. So one partner may sue another for money loaned to pay the latter's share of an execution against the firm. Chamberlain *v.* Walker, 10 Allen (Mass.), 429.] And if persons enter into partnership, and pay in their respective contributions, one of them cannot now recover back his share from the others, though the concern prove a losing one and is abandoned. The shares of all the partners are now only subject to an account. See opinion of Cockburn, C. J., in French *v.* Styring, *supra;* Nockels *v.* Crosby, 3 B. & C. 819, 824, opinions of Holroyd and Littledale, JJ. See also Gale *v.* Leckie, 2 Stark. 107; Townsend *v.* Goewey, 19 Wend. 424; Manning *v.* Wadsworth, 4 Md. 59; Rockwell *v.* Wilder, 4 Metc. 561; Wright *v.* Mickie, 6 Gratt. 354; Robinson *v.* McIntosh, 3 E. D. Smith, 221. It has been said, that it is not competent for partners to agree in their articles that such person as a majority of them shall afterwards appoint shall have the power to sue in his own name for moneys agreed to be contributed by each partner to the general fund. Fortune *v.* Brazier, 10 Ala. 791. But we have much doubt of this. See *post*, p. *275, and note (*u*).

(*j*) Causes subsequent to dissolution, from which a right of action between partners may arise, may be such as originate solely in the relations of partners to third persons. Osborne *v.* Harper, 5 East, 225; Wright *v.* Hunter, 1 East, 20, 5 Ves. 792. See Butcher *v.* Forman, 6 Hill, 583. See Wright *v.* Cumpsty, 41 Penn. 102, where the plaintiff and defendant dissolved partnership, but, before the formal and public dissolution, the defendant contracted large debts in the name of the old firm, which the plaintiff paid. *Held*, that the plaintiff might recover the amount in an action against the defendant as money paid to his use. Hutton *v.* Eyre, 6 Taunt. 289, 1 Marsh. 603. But if there are more than two partners, and if, after dissolution, by the misconduct of one, the rest are compelled to pay money to third parties, it is important to ascertain whether such payment is made out of a joint fund, or by the several contributions of each; for, after dissolution, there is generally no joint stock or fund, and if such payment is made by an aggregate of the several funds of the contributing partners, then each contributor must bring a separate action for the amount of his advance, because *quoad* that payment the contributors are not partners. See Osborne *v.* Harper, *supra;* Graham *v.* Robertson, 2 T. R. 282; Brand *v.* Boulcott, 3 B. & P. 235; Kelby *v.* Steel, 5 Esp. 194; Manahan *v.* Gibbons, 19 Johns. 109, 112, 426; Doremus *v.* Selden, id. 213.

Of the foregoing cases, it is to be

if there were three partners, and the partnership is dissolved by consent, and there is a charge against one of them for a thousand dollars, and he borrows money from another partner to pay it, and does so pay it, the lender can sue the borrower, although the accounts are unsettled, and it is uncertain where the final balance will lie or what it will be. (*k*) But if, in such a case, the accounts are all adjusted and balanced, and it is certain that the lender owes the borrower, as partner, on this final balance, what he thus owes might be applied by way of set-off to the lender's action. But not unless the accounts are settled. (*l*) In a suit between partners, the account books of the firm, although inaccurately kept, are admissible evidence against a partner having access to them. (*ll*)

If one partner sells his separate property to his partner, this does not make it partnership property; and the seller may sue the buyer for the price, at law. (*lll*)

* If the parties to a debt or contract can be considered * 273
in reference to it as only joint sureties or joint contractors, (*m*) or connected in any other way than as part-

observed, that the parties were not partners at the time of action brought; that the cause of action accrued subsequently to dissolution; and that the subject-matter of the suit was in no way connected with the partnership nor with the partnership accounts. See Milburn *v.* Codd, 7 B. & C. 419. Though the plaintiff and defendants had ceased to be partners, and the cause of action had accrued after their dissolution, yet the subject-matter of the suit was deemed to be properly an item of the unsettled partnership accounts, and the plaintiff's action, therefore, not maintainable. See De Jarnette *v.* McQueen, 31 Ala. 230.

(*k*) A. & B. dissolved partnership, and A. assumed the possession and entire control of the partnership stock in trade. In disposing of the goods, he sold a part of them to B., who signed a bill of sale, acknowledging the purchase of A. *Held*, that A. might recover the value of the goods in an action at law against C. Caswell *v.* Cooper, 18 Ill. 532. The plaintiff and three other persons entered into partnership for a single adventure, the plaintiff furnishing all the capital. The defendant was one of the four partners, and the adventure being closed, and the firm dissolved, the capital was deposited with the defendant for the plaintiff. *Held*, that it thereby became the individual property of the plaintiff, and could be recovered by him of the defendant. Myers *v.* Winn, 16 Ill. 135. See Warbritton *v.* Cameron, 10 Ind. 302; Rockwell *v.* Wilder, 4 Metc 562; Roache *v.* Pendergrast, 3 Harris & J. 33; Chamberlain *v.* Walker, 10 Allen, 429. See Wycoff *v.* Purnell, 10 Iowa, 332.

(*l*) Ives *v.* Miller, 19 Barb. 196. See Pool *v.* Delaney, 11 Mo. 570; Scott *v.* Campbell, 30 Ala. 728; Coleman *v.* Coleman, 12 Rich. Law (S. C.), 183.

(*ll*) Topliff *v.* Jackson, 12 Gray, 565.

(*lll*) Elder *v.* Hood, 28 Ill. 538.

(*m*) Burnell *v.* Minot, 4 J. B. Moore, 340; Helme *v.* Smith, 7 Bing. 709, 713,

ners, (*n*) the disability of partnership does not apply, although they may be partners generally. (*o*)

It is quite clear that certain particular and distinct transactions may be separated from the affairs or business of the partnership, by the agreement of the parties. (*p*) Then those persons who are concerned in this separated matter are not as partners to each other, although in all other business relations they remain partners. And it may be added, the law will take cognizance of any such separated transaction, and of any single one of which the character or circumstances are such as to indicate that the meaning of it is, that one partner shall
* 274 pay a certain sum of money to * another partner before any account is taken; which money is not to be carried into the general account when that is taken. (*q*)

714; Holmes *v.* Williamson, 6 Maule & S. 158; Ansell *v.* Waterhouse, 6 id. 390, per Bayley, J.; Blackett *v.* Weir, 5 B. & C. 385, 388; Batard *v.* Hawes, 2 Ellis & B. 287.

(*n*) If a person is only a nominal partner, but, from being held out as a partner to third persons, is obliged to pay the debts of the firm, he may, in an action against the actual partner, show the true nature of his relations to the firm, and recover the whole amount he has been compelled to pay. Latham *v.* Kenniston, 13 N. H. 213. In like manner, if persons share in profits in such a way that they are partners *quoad* third persons, but yet are not partners *inter se*, there is nothing to prevent an action being maintained by either against the other. Hesketh *v.* Blanchard, 4 East, 144.

As to a distinction between a general and a special partnership, see Galbraith *v.* Moore, 2 Watts, 86. See Brigham *v.* Eveleth, 9 Mass. 538; Jones *v.* Harraden, id. 540; Gow on Part. [79], citing Abbott *v.* Smith, 2 W. Bl. 947; per Lord Kenyon, Merryweather *v.* Nixon, 8 T. R. 816; Graham *v.* Robertson, 2 id. 282; Herries *v.* Jameson, 5 id. 556; Evans *v.* Yeatherd, 2 Bing. 133; Wilson *v.* Cutting, 4 Moore & S. 268; Noel *v.* Bowman, 2 Litt. 46; Wright *v.* Hunter, 5 Ves. 792.

(*o*) As where four persons, who had acted as directors of a proposed railway company, being sued for debts contracted on account of the concern, jointly retained an attorney to defend them on their personal responsibility, *held*, that one of the four, who had paid the attorney's bill, was entitled to sue the others for contribution. Tindal, C. J.: "If these four persons entered into the contract with the attorneys, distinct from their character of members of the company, it appears to me that the case does not fall within the general rule." Edger *v.* Knapp, 6 Scott N. R. 707, 712; Boulter *v.* Peplow, 9 C. B. 493; Sedgwick *v.* Daniell, 2 H. & N. 319.

(*p*) Coffee *v.* Brian, 10 J. B. Moore, 341, 3 Bing. 54; Cross *v.* Cheshire, 6 Exch. 43, 6 Eng. L. & Eq. 517. See Cousten *v.* Burke, 2 Harris & G. 300, 303; Collamer *v.* Foster, 26 Vt. 754; Williams *v.* Henshaw, 11 Pick. 83, 84; Gibson *v.* Moore, 6 N. H. 547; Caswell *v.* Cooper, 18 Ill. 532; Buckner *v.* Ries, 34 Mo. 357. The *nisi prius* case of Robson *v.* Curtis, 1 Stark. 78, seems hardly reconcilable with the principle of the foregoing decisions.

(*q*) See the language of Bayley, J., in Jackson *v.* Stopherd, 2 Cromp. & M. 361, 4 Tyrw. 330; and see Finlay *v.* Stewart, 56 Penn. St. 183.

On similar grounds, a partner can sue a partner on his note or indorsement or acceptance. (*r*) Nor do we think it would be competent for the defendant to defeat such an action by showing that it was, in fact, on partnership account, or a partnership debt, because this would vary by evidence a written contract. (*s*)

So, too, if a partner receives a sum of money actually belonging to his partner, but carries the same to partnership account, the partner to whom the money belongs may, nevertheless, sue the partner who received it. (*t*) And, in general, the mere

(*r*) Preston *v.* Strutton, 1 Anst. 50; Neale *v.* Turton, 4 Bing. 151; Bonaffe *v.* Fenner, 6 Smedes & M. 212; Grigsby *v.* Nance, 3 Ala. 347; Morrison *v.* Stockwell, 9 Dana, 172; Lomas *v.* Bradshaw, 9 C. B. 620. See Teague *v.* Hubbard, 8 B. & C. 345; Case *v.* Maxey, 6 Cal. 276. And, where it is ascertained by two partners who are about closing their concerns, that a balance will certainly be due by one of them to the other on a final settlement, although the true balance cannot at the time be ascertained, then if such debtor partner gives his note to the creditor partner for a sum within the balance which it is acknowledged will be due to him on the final settlement, such note is given upon a good consideration, and is equivalent to an express promise to pay the given sum mentioned; and the payment of such note may be enforced at law, though the balance is not struck between them. Rockwell *v.* Wilder, 4 Metc. 562. See Ives *v.* Miller, 19 Barb. 196; Pool *v.* Delaney, 11 Mo. 570. See Gridley *v.* Dole, 4 Comst. 486. In Van Ness *v.* Forrest, 8 Cranch, 30, it was *held*, that a promissory note, given by one partner to another for the use of the copartnership, will sustain an action in the name of the promisee against the maker, notwithstanding the connection, and that the money, when recovered, would belong to the copartnership.

(*s*) It should be remembered, with respect to negotiable paper, that credit is deemed to be given exclusively to those whose names appear on the face of the paper, and that it is not allowable to add parties by parol. See 1 Pars. on Notes & Bills, pp. *93, *102. [But, to an action on a note given by an outgoing partner for assets, he may set up in defence an agreement, that, for any notes or accounts that should prove worthless, he should be allowed a deduction *pro tanto*. Bethel *v.* Franklin, 57 Mo. 466.]

(*t*) The plaintiff, and Robert Smith, his father, had been in partnership, during which time one Keate became indebted to them in 531*l*. Robert Smith died, leaving plaintiff his sole executor. Subsequently, the plaintiff took the defendant into partnership, and Keate became indebted to these two in the further sum of 30*l*. He afterwards became involved, and his effects were assigned to trustees, for the benefit of his creditors. Two payments were made in the course of distribution at different times. The first, which was made to the plaintiff and defendant, was divided between them according to their several proportions; that is, the proportion of the former debt of 531*l*. to the plaintiff's separate use, and the proportion of the 30*l*. in moieties between them. After this, the trustees transmitted a bill of exchange to the plaintiff and defendant in their joint names, and the defendant alone received the money under the title of Smith & Barrow. The plaintiff's proportion of this second dividend, so far as related to his original debt, was 79*l*. 14*s*. 6*d*. The

*275 fact that *a transaction is entered upon partnership books or accounts as belonging to the partnership will not prevent a suit by the partner to whom it actually belongs; as only the fact of, and not the appearance of, partnership interest could defeat his suit.

If there be a firm of more than two persons, and, on settlement, one is found to have withdrawn more than his share, the other two may have a joint action against him thereon; but neither one of the other two can sue separately, although he has an assignment of all the rights and interests of his associates in the assets of the firm. (*tt*)

If the articles of partnership, or other agreements between the partners, are under seal, covenant will lie for any breach of the agreement to enter into partnership, or of any stipulation for payment, advances, or other acts for setting the partnership into operation, although accounts between the partners which are subsequent to the partnership require to be investigated and adjusted in a court of equity. (*u*)

question was, whether the plaintiff could recover this sum from the defendant, in an action for money had and received to the plaintiff's use, it being contended for the defendant that it was money received on account of a partnership transaction, and therefore not recoverable in the present action. *Held*, that he could maintain this action. Smith *v.* Barrow, 2 T. R. 476. See Coffee *v.* Brian, 10 J. B. Moore, 341, 3 Bing. 4; *ante*, p. *271 and notes; Cross *v.* Cheshire, 7 Exch. 43, 6 Eng. L. & Eq. 517.

(*tt*) Wiggin *v.* Cummings, 8 Allen, 353.

(*u*) Venning *v.* Leckie, 13 East, 7; *Ex parte* Notley, 1 Mont. & A. 46; Glover *v.* Tuck, 24 Wend. 153; Terrill *v.* Richards, 1 Nott & McC. 20; Williams *v.* Henshaw, 11 Pick. 81; Ellison *v.* Chapman, 7 Blackf. 224; Bailey *v.* Starke, 1 Eng. 191. In like manner, covenant will lie, subject to the qualification stated in the text, for the breach of any of the stipulations in the articles of partnership after the partnership has actually begun. Glover *v.* Tuck, *supra;* Want *v.* Reese, 1 Bing. 18; Hatcher *v.* Seaton, 2 M. & W. 47; Bedford *v.* Brutton, 1 Scott, 261, 262; M'Arthur *v.* Ladd, 5 Ohio, 514, 521; Duncan *v.* Lyon, 3 Johns. Ch. 351, 362; Hayes *v.* Flowers, 25 Miss. 168; Ridgway *v.* Grant, 17 Ill. 117; Manning *v.* Wadsworth, 4 Md. 70; Hall *v.* Stewart, 12 Penn. St. 213; Capen *v.* Barrows, 1 Gray, 376. But covenant does not lie, on an agreement of partnership, to compel the payment of a balance due to the partnership from one of the partners. Niven *v.* Spickerman, 12 Johns. 401. An action will lie between partners for the breach of a covenant to account. And in the simple case of a single, or at most but temporary, breach of partnership covenants, unless the bill pray for, and there are just grounds for, dissolution, equity will not interfere by injunction or otherwise; but will leave the injured party to his action of covenant, as the more appropriate remedy. Marshall *v.* Colman, 2 Jac. & W. 266.

Each partner, committing a breach of his covenant, may be sued by all the rest jointly for the joint damage

* Whenever there has been any breach of an express * 276
stipulation between persons who are partners, an action for damages will be sustainable, unless the breach, or the stipulation itself, or both, are such that they involve the whole partnership business and accounts, and the damages can be

sustained by them in respect thereof: for the covenant of each covenantor is, in contemplation of law, made with all the rest, excluding himself, and all the rest are joint as against him; "for if there be twenty partners, and one of them covenants with all the rest, he is, in that respect, several from them all, and they all joint against him." *Per curiam* in Thimblethorpe *v.* Hardesty, 7 Mod. 117; Vesey *v.* Mantell, 9 M. & W. 323; Eccleston *v.* Clipsham, 1 Saund. 153; Wright *v.* Michie, 6 Gratt. 354, 358; Spencer *v.* Durant, Comb. 115; Saunders *v.* Johnson, Skin. 401; Capen *v.* Barrows, 1 Gray, 376. It was *held*, in one Massachusetts case, on the supposed authority of an English decision, that where three or more copartners have contributed severally and in different proportions to the joint stock, and one of them withdraws from the copartnership, in violation of their mutual agreement, each has his several remedy for a breach. Dunham *v.* Gillis, 8 Mass. 462. See Thomas *v.* Pyke, 4 Bibb, 418. But Dunham *v.* Gillis has recently been overruled, and the authority of the case upon which it was decided strongly questioned, in Capen *v.* Barrows, *supra*, by Metcalf, J., in delivering the opinion of the court. Though partners covenant, each respectively with the others, and with their respective executors, administrators, &c., upon the death of one of the partners, a covenantee, his right of action survives to his co-covenantees. Eccleston *v.* Clipsham, 1 Saund. 153.

As in actions of covenant between partners, so in actions upon simple contracts, each partner is regarded as contracting with the rest, excluding himself, and may be sued by all the rest jointly for the violation of his contract; he being several from them all in respect of the breach, and they all joint against him. Venning *v.* Leckie, 13 East, 7.

Though partners cannot, by agreement among themselves, give an authority to any one of them to bring an action in his name against persons not members of the firm, there is no objection to their empowering one of their number to be the sole plaintiff in actions to be brought *inter se* in the course of the partnership business. "Such an agreement is, in effect, an undertaking not to object on account of all who ought otherwise to have joined in the action not being joined." Per Best, C. J., in Radenhurst *v.* Bates, 3 Bing. 463, 470; Cross *v.* Jackson, 5 Hill, 478. In this last case, the property and interest of a large association were, by their articles, vested in trustees thereafter to be elected, and the subscribers agreed to pay to such trustees their respective subscriptions. Cowen, J., said: "The effect was, on the trustees being elected, as provided by the articles, to vest every legal right of the company in them, the right to sue the defendant in their own names inclusive. Had it been left for the law to imply a promise, it would, no doubt, have looked to the other stock subscribers as the promisees, because the consideration came from them; and, in that case, the action must have been in the names of the whole." Niven *v.* Spickerman, 12 Johns. 401. See Davies *v.* Hawkins, 3 Moore & S. 488; see also Fortune *v.* Brazier, 10 Ala. 791, *ante*, p. * 271, note, for a case hardly reconcilable with the above authorities; Brown *v.* Tapscott, 6 M. & W. 119.

determined only by first settling those accounts. (*v*) Thus, if one partner agrees to pay another a certain salary, or commission, or other compensation for his services, over and above his share of the profits, and independently of them, it would seem that an action at law can be maintained on this promise. (*w*) And the same rule would probably apply to the breach of any distinct and independent agreement in the articles of partnership, unless the difficulty of determining the damages without a general settlement should make the action nugatory, and be sufficient to defeat it.

* 277

The common law formerly allowed to a partner scarcely any remedy whatever against a partner. It seemed to say that partners have agreed to trust each other, and waive all legal rights. Malynes expressly declares that "partners cannot sue each other by the law. If two men have a wood jointly, and the one selleth the wood and keepeth the money all to himself, in this case his fellow shall have no remedy against him by the common law; for as they, when they took the wood jointly, put each other in trust, and were contented to occupy and deal together, so the law suffereth them to order the profits

(*v*) Capen *v.* Barrows, 1 Gray, 376. See Bedford *v.* Brutton, 1 Bing. N. C. 407; see Andrews *v.* Ellison, 6 J. B. Moore, 199; and compare Bedford *v.* Brutton, *supra*, with Estes *v.* Whipple, 12 Vt. 373. See also Ridgway *v.* Grant, 17 Ill. 117.

(*w*) Paine *v.* Thacher, 25 Wend. 450. In Weaver *v.* Upton, 7 Ired. 458, the action was covenant, and the breach assigned the non-payment of $450 by the defendant to the plaintiff. The covenant was contained in articles of copartnership between Upton & Weaver, and was as follows: "The said Upton, of the first part, bargains and agrees to give me, the said Weaver of the second part, four hundred and fifty dollars, to manage the business, which I agree to manage according to the best of my judgment, ——." In this action, the defendant's counsel moved to nonsuit the plaintiff, upon the ground that the covenant amounted to an article of copartnership, and that the $450, for the non-payment of which the covenant was alleged to have been broken, was to be allowed out of the funds of the copartnership. A nonsuit was accordingly entered, and upon appeal the judgment was affirmed. The court said: "The parties were stipulating concerning the partnership business, and the terms on which it was to be carried on; and, among others, that Upton bargained and agreed to let Weaver have $450, for his services that year. *It seems* to us that it would be against justice and right to construe the covenant to be an agreement by Upton, that he would pay that sum out of his own pocket. We think that it was an item in the expense account of the firm, and that the firm should pay it." The case of Hills *v.* Bailey, 27 Vt. 548, is quite similar. [When partners agree to put into the firm a specified amount, each may sue the other for a breach of the agreement. Trait *v.* Baird, 12 Kan. 420.]

thereof." (*x*) But the law, in these days, would not suffer the one to do so great a wrong to the other. We have already seen, and shall again see, that the law sustains actions, and gives remedies, between partners, unless more substantial and sufficient reasons than the mere theory, or rather fancy, stated by Malynes, interferes to prevent the law from doing justice.

If a partner gives his copartner a sum of money for a specific purpose, and the copartner keeps the money, there is authority and reason for holding that the partner who gave the money may sue him who received and holds it. (*y*) So a partner may sue his partner on a matter separated by an award. (*yy*)

2. *Of a Demand founded upon a Balance of Account Stated.*

*There are no cases in which an action at law by *278 partner against partner is maintained, so numerous or diversified as those which are founded upon the striking of a balance. There is much conflict and uncertainty among them; most of which, we think, might have been avoided by a distinct recollection of the reasons and principles obviously applicable to such cases.

The general rule is, that a partner may sue at law a partner on a promise to pay a balance which has been struck and agreed upon. (*z*) The reason for this is clear and certain; it is, that

(*x*) Malynes, Lex Merc. 310.

(*y*) See Sharp *v.* Warren, 6 Price, 131, where the auditor of a benefit club, himself a member, having misapplied the funds of the society and refused to pay them over, it was *held*, that the proper officers of the club, suing in its name, might maintain *indebitatus assumpsit* against him for the amount, on the ground that the defendant's carrying away the money, and leaving the society, made him liable to them, as if he were not himself a member of the society, and that he had placed himself out of the protection of his situation in the society by his conduct in withdrawing. See Smith *v.* Barrow, 2 T. R. 476; *ante*, p. *274 and notes; Cross *v.* Cheshire, 6 Exch. 43; *ante*, p. *271 and notes.

(*yy*) [One partner may sue another on an award upon a partnership matter in dispute between them, other partnership matters being still unsettled. Blakeley *v.* Graham, 111 Mass. 8.]

(*z*) And, as we have already seen, an action may be maintained upon such a promise, notwithstanding a covenant to account between the parties. Moravia *v.* Levy, 2 T. R 483, note. See, in illustration of the general principle enunciated in the text, Preston *v.* Stratton, 1 Anst. 50; Brierly *v.* Cripps, 7 C. & P. 709; Wray *v.* Milestone, 5 M. & W. 21; Henley *v.* Soper, 8 B. & C. 16; Winter *v.* White, 1 Brod. & B. 350; Ozeas *v.* Johnson, 1 Binn. 191, 4 Dall. 434; Walker *v.* Long, 2 P. A. Browne, 125; Young *v.* Brick, 2 Penning. 663; Beach

all the reasons for refusing this remedy at law disappear from such a case. For, in the first place, as to a settled balance, they are no longer partners. If the settlement has closed their concerns, or has followed the dissolution of the partnership, they are no longer partners at all; if the partnership goes on, they are not partners as to this balance, because it has been taken out of the current accounts, separated from the partnership, and appropriated to the partner to whom it is due. In the next place, there is no longer any objection on the ground that the law cannot take an account of the partnership debts and means, and take into view all those facts and considerations which are necessary in order to ascertain who owes the
* 279 other, and how much. The law cannot do it, and * equity will not do it; for it has been done already by the parties themselves. As there is now no reason for a court to do it, the inability of a court to do it constitutes no reason for refusing cognizance of the case.

We apprehend the true rule to be, that courts of law should sustain any action between partners of the character above described. But the question is sometimes decided on more technical grounds. Sometimes it is said that no such action will be maintained, unless for a *final* balance. And this was asserted somewhat *obiter* perhaps, in Massachusetts, at a time when the equity powers of the Supreme Court of that State were not so extensive as they now are; and it was added, that all the different States concur in this. But after remarking that in some of our States, and in England, no suit at law, even for a final balance, can be maintained, unless upon an express promise to pay this balance, the court go on to say that, in Massachusetts, this is unnecessary; and the suit will be main-

v. Hotchkiss, 2 Conn. 425; Lamalere *v.* Caze, 1 Wash. C. C. 435; Wetmore *v.* Baker, 9 Johns. 307; Murray *v.* Bogert, 14 id. 318; Clark *v.* Dibble, 16 Wend. 601; Attwater *v.* Fowler, 1 Hall, 180; Calvert *v.* Marlow, 6 Ala. 342; Gulick *v.* Gulick, 2 Green, 578; McColl *v.* Oliver, 1 Stew. 510; Fanning *v.* Chadwick, 3 Pick. 420; Van Amringe *v.* Ellmaker, 4 Barr, 281. So, if it is agreed between a surviving partner, and the representative of one deceased, that the former will pay the latter a certain sum of money in consideration of all interest in the partnership account being relinquished, an action of assumpsit to recover the sum agreed upon may be maintained. Wells *v.* Wells, Ventr. 40. See Lane *v.* Tyler, 49 Me. 108; Holyoke *v.* Mayo, 50 Me. 385; Nims *v.* Bigelow, 44 N. H. 376; Goble *v.* Howard, 12 Ohio, 165; Wright *v.* Cumpsty, 41 Penn. 102.

tained although the accounts are not closed between the partners, and there exist outstanding debts; provided these debts are valueless, or the plaintiff tenders them to the defendant before the action. (*a*)

It would seem, therefore, that the phrase "final balance" is not used in a very strict sense, although, in another part of the same decision, the court ask, "Is the account a final balance, and will the payment in this suit be an absolute termination of all the partnership accounts between these parties?" (*b*) the last clause * of this sentence being in the nature of * 280 a definition of a final balance.

It is certain, as our notes show, that there are high authorities which recognize a rule requiring that the balance should be final; meaning that the accounts should be closed and this balance be the result, and that there should be also an express promise to pay this balance. (*c*) But this is going further

(*a*) Williams *v.* Henshaw, 11 Pick. 81, 82.

(*b*) In Williams *v.* Henshaw, 12 Pick. 378, the question, as stated by the court was, "whether one partner, after the expiration of the joint concern, or even after dissolution, can, at any time, without any settlement, without any agreement with or notice to his copartner, by *assuming* all the outstanding debts, maintain assumpsit against him for any balance which may be due?" The court *held* that he could not; and for the reason, that, notwithstanding a judgment for the plaintiff on a balance thus made out, "in many ways new balances might arise, which would give rise to new actions, and thus create a multiplicity of suits." See Brinley *v.* Kupfer, 6 Pick. 179; Sikes *v.* Work, 6 Gray, 433. In Wilby *v.* Phinney, 15 Mass. 116, the expression "final balance" seems to be used with great latitude. See Fanning *v.* Chadwick, 3 Pick. 420, 423; Rockwell *v.* Wilder, 4 Metc. 561. See also Haskell *v.* Adams, 7 Pick. 59; Capen *v.* Barrows, 1 Gray, 376, 382. In Haskell *v.* Adams, several members of a company gave its agent their note, which was discounted, and money raised for the use of the company. The company being dissolved, the partners who gave the note brought assumpsit against another partner to recover the proportion of the amount of the note due from him. The company was still in debt, and no adjustment of their affairs had been made. *Held*, that the action could not be maintained.

It may be inferred from all the above cases that the balance which is treated as final, is one occurring upon the dissolution of the firm. And in Dickinson *v.* Granger, 18 Pick. 317, the court say expressly: "A final balance of course can never arise till after a dissolution." [Before one partner can sue another at law, there must be a dissolution, a final settlement, a balance struck, and a promise to pay. Balances struck preparatory to a settlement will not support an action. Burns *v.* Nollingham, 60 Ill. 561.]

(*c*) That there must be an express promise to pay a balance, seems to have been *held* by Buller, J., in Moravia *v.* Levy, 2 T. R. 483, note; though in Foster *v.* Allanson, id. 479, the same judge said that he had no difficulty in holding that the dissolution of a previously existing partnership and the settlement of an account were, in point

than the weight of authority; and much further, we think, than the reason of the case extends. The later English authorities appear to have established the rule in that
*281 country, that an express promise is *not necessary, because a promise is implied in closing the accounts and stating the balance. (*d*)

of law, "a sufficient consideration for a promise;" which remark seems as applicable to an implied as to an express promise. But in Fromont *v.* Coupland, 2 Bing. 170, it was distinctly intimated by the court, mainly upon the authority of the cases just cited, and contrary to the *nisi prius* case of Rackstraw *v.* Imber, Holt N. P. 368, that there must be an express promise. It is to be observed, however, that the court also *held*, that no balance had been struck between the parties, and that the case was decided, partly at least, on that ground. In this country, Fromont *v.* Coupland, and Moravia *v.* Levy, have been followed in quite a number of the States. Thus, in New York, one partner cannot recover a balance of accounts, except there be an express promise to pay it. Casey *v.* Brush, 2 Caines, 293; Halsted *v.* Schmelzel, 17 Johns. 80; Westerlo *v.* Evertson, 1 Wend. 532; Townsend *v.* Goewey, 19 id. 424; Pattison *v.* Blanchard, 6 Barb. 537. So in South Carolina: Course *v.* Prince, 1 Mill's Const. R. 416. In Illinois: Davenport *v.* Gear, 2 Scam. 495; Frink *v.* Ryan, 3 id. 322; Chadsey *v.* Harris, 11 Ill. 151; Blue *v.* Leathers, 15 id. 32; and see Wycoff *v.* Purnell, 10 Iowa, 332. In Pennsylvania, the early cases seem to hold, that the promise upon which one partner may recover from another a balance of accounts need not be express. Ozias *v.* Johnson, 1 Binn. 191, 4 Dall. 434; Lamalere *v.* Caze, 1 Wash. C. C. 435; Hourguebie *v.* Girard, 2 id. 212; Williams *v.* Henshaw, 11 Pick. 81. But in Killam *v.* Preston, 4 Watts & S. 14, the court seemed inclined to hold, apparently upon the authority of the earlier English cases, that the promise must be express. But this was not directly ruled. And in Van Amringe *v.* Ellmaker, 4 Penn. St. 281, the court *held*, that, conceding the principle that assumpsit will not lie by one partner to recover from the other a balance due upon the settlements of the partnership accounts, without proof of an express promise to pay, yet the execution of a note for the balance due after settlement was a sufficient express promise. See Brown *v.* Agnew, 6 Watts & S. 235; Hamilton *v.* Hamilton, 18 Penn. St. 20. Whether an express promise is requisite in New Jersey and in North Carolina, see Jaques *v.* Hulit, 1 Harrison, 38; Gulick *v.* Gulick, 2 Green, 578; Graham *v.* Holt, 3 Ired. 300.

(*d*) Rackstraw *v.* Imber, Holt N. P. 368. The plaintiff and defendant, having dissolved partnership, met to adjust their accounts. The defendant admitted a certain balance to be due from him to the plaintiff; and offered to pay it, if the plaintiff would sign a certain deed. The plaintiff refused to sign the deed, and brought the present action for the admitted balance. It was *held* that he was entitled to recover. See Henley *v.* Soper, 8 B. & C. 16, 21. In Wray *v.* Milestone, 5 M. & W. 21, the plaintiff and defendant, beside having other general dealings, had also been partners in a particular adventure for the purchase and sale of wool. They came to a general account, of which a debit against the defendant for loss on wool formed one item. The defendant signed the account, and admitted the balance due. The present action was brought to recover the amount of the item entered in the account as the "loss on wool." Upon motion for a new trial, one of the questions was, whether a sufficient promise by the defendant was proved. Lord Abinger, C. B.: "The account

The act of settling the account and striking the balance is itself the plainest acknowledgment of an indebtedness which is wholly liberated from all complication with the accounts of the partnership: it grows out of them, but only out of their termination and settlement. Nor can we doubt that this rule of law must prevail in this country also. (*e*)

Then, as to the question whether the balance must be a final one, we cannot but think that it is quite enough if it be a balance, or a debt, distinctly separated from the partnership accounts, *either by their entire settlement, or by a set- *282 tlement which may be partial as to the affairs of the partnership, but complete as to this debt. If not absolutely final, perhaps a presumption will always exist that it remains connected with partnership affairs. But, as it is perfectly well settled that a partner may sue his copartner on a cause of action which never pertained to the partnership, it seems quite as certain that he should have his action for a cause which he can show to have been cut out from the partnership by himself and his partners jointly, and to be as completely separated from it as if there had never been any connection between them.

being settled, there is an unqualified acknowledgment, signed by the defendant, that 15*l.* is due from him to the plaintiff on the general balance of accounts between them." . . . "If the item forms part of a settled account, with a promise to pay the balance, I think there is no need of an express promise to pay the particular item." Parke, B.: "There is no occasion to go through the form of words that he promises: the transaction speaks for itself." Maule, B.: "I know of no rule of law which requires in this, or in any other case, an express promise." In Jackson *v.* Stopherd, 2 Cromp. & M. 361, to which we have already referred, *ante*, p. *274 and notes, two persons who had worked a coal-mine having dissolved partnership, and made an agreement for the division of a certain portion of their property, the nature of their bargain for the division and the subsequent actual use by one partner of the whole property, was *held* to raise an implied obligation on him to pay the other partner for a moiety of it. Cross *v.* Cheshire, 7 Exch. 43; *ante*, p. *271 and notes. In this case, a promise by the defendant to pay the plaintiff, his partner, the sum sued for, was implied from the defendant's admission, that, through his own improper use of the partnership name, the plaintiff had been compelled to expend that sum for the defendant's sole benefit.

(*e*) In Massachusetts, an action by one partner against another to recover a balance of accounts, may be sustained upon an implied promise. Williams *v.* Henshaw, 11 Pick. 79; Wilby *v.* Phinney, 15 Mass. 116, 121; Brigham *v.* Eveleth, 9 id. 538; Fanning *v.* Chadwick, 3 Pick. 420; Dickinson *v.* Granger, 18 id. 317. So also in Alabama, M'Coll *v.* Oliver, 1 Stew. 510; Pope *v.* Randolph, 13 Ala. 214; and in Vermont, Spear *v.* Newell, 13 Vt. 288. See *ante*, p. *279, note (*b*).

It is, undoubtedly, necessary that all the partners should be bound by the settlement, or by the agreement by which this matter was separated from the partnership. (*f*) In few words, we think it not necessary that the balance should be general as well as final; but it is sufficient if it be so far final that the decision of the question will be final upon all parties, and that nothing which can happen to the partnership will make it necessary or just to review this decision. (*g*)

(*f*) See Gill *v.* Kuhn, 6 S. & R. 333; Course *v.* Prince, 1 Mill's Const. R. 416; Borill *v.* Hammond, 6 B. & C. 149, 151, per Littledale, J.; Carr *v.* Smith, 5 Q. B. 128; Chadsey *v.* Harris, 11 Ill. 151; Morrow *v.* Riley, 15 Ala. 710. One partner may impliedly assent to and be bound by an account stated. So *held*, per Washington, J., in Lamalere *v.* Caze, 1 Wash. C. C. 437. But see Killam *v.* Preston, 4 Watts & S. 14. See also Beach *v.* Hotchkiss, 2 Conn. 425; Robinson *v.* Williams, 8 Metc. 454.

(*g*) It seems to be well established by the English cases (to some of which we have already alluded), that the balance for which a suit will lie between partners is not necessarily a general balance of all the accounts between them, but may be a balance in respect of specific matters, which, by agreement, have been insulated from the general accounts. So in Jackson *v.* Stopherd, 2 Cromp. & M. 361; Coffee *v.* Brian, 3 Bing. 54; Cross *v.* Cheshire, 7 Exch. 43; Brown *v.* Tapscott, 6 M. & W. 119. So where a balance of accounts is taken, and a note given as the balance, that must be paid; although there are subsequent accounts upon which the payee may eventually be found in arrears. Preston *v.* Strutton, 1 Anst. 50. The plaintiff and defendant were partners in a stage-coach company, which was dissolved in the month of November. The plaintiff's action was for the recovery of certain balances of accounts, by which it appeared that, during the partnership, a balance was struck every month; and that for the months of September, October, and November, balances had been found due from the defendant to the plaintiff, though the balance for November had since been paid. *Held*, that the plaintiff might recover the balances in his favor on the September and October accounts. Brierly *v.* Cripps, 7 C. & P. 709; Carr *v.* Smith, 5 Q. B. 128. In Vermont, a partner can recover only a balance found due to him upon dissolution, and after the adjustment of all the partnership dealings. Spear *v.* Newell, 13 Vt. 288; Warren *v.* Wheelock, 21 id. 323. See Sawyer *v.* Proctor, 2 id. 580. The same is true in Illinois. Davenport *v.* Gear, 2 Scam. 495; Chadsey *v.* Harrison, 11 Ill. 151; and is apparently the doctrine of the following cases: Graham *v.* Holt, 3 Ired. 300; Pope *v.* Randolph, 13 Ala. 214; Killam *v.* Preston, 4 Watts & S. 14; Halderman *v.* Halderman, 1 Hempst. 558; Chase *v.* Garvin, 19 Me. 211. The proposition of the text is sustained in the case of Gibson *v.* Moore, 6 N. H. 547, in which all the leading authorities are reviewed, and a conclusion reached which seems to be founded both upon the better authority and the better reason. There the plaintiff and defendant had been partners. A controversy having arisen respecting some of their partnership affairs, they referred the matters in dispute to arbitration. The referees awarded that the defendant should pay the plaintiff $88.08, and the defendant promised to pay the award. But there had been no settlement of the general concerns of the partnership, nor any final balance struck. The present action was assumpsit on the award, and the court *held* that it might be maintained. Parker, J., said: "In

* It is of no importance how the settlement has been * 283
made; whether by the parties, or by law, or by arbitration. (*h*) Indeed, a suit on an award has been maintained, where the partners submitted "all differences" between them to the arbitrators, on the ground that an award in such a case is a final settlement of the partnership: and this rule was applied in one case where the plaintiff could not have sued the defendant on the agreement to submit. (*i*)

* So where the settlement did not embrace all the * 284
debts, some of no great amount being left outstanding, the plaintiff was permitted to enter a *remittitur* as to these. (*j*) It is said that if there be a dissolution or expiration of the period of partnership, no partner can, without the consent of his copartner, assume all the outstanding debts as belonging to him, and, allowing their full value, so strike a balance, and sue his copartner. (*k*) But it must be true that the mere

the present case, there has been no final balance struck. The settlement of the partnership concerns generally still remains to be made. But, by agreement between the parties, in relation to a specific portion of the partnership transactions a final adjustment has been made. The partners have agreed to close thus far, and one has agreed to pay the other a certain sum notwithstanding. Nor is it of any importance that the debts of the partnership are not all paid, if such be the fact. Creditors cannot object. They will have the responsibility of both partners still, nor is the payment of money by one partner to the other to their prejudice. If it was, that could not prevent the partners from adjusting the concerns between themselves, so as to create a liability from one to the other. They are not parties here, nor their rights in question. If partners can pledge the partnership property for the debt of an individual partner, and creditors cannot hold it (Whitney *v.* Dean, 5 N. H. 249), they may surely make any adjustment of the partnership interests among themselves that they think expedient." And see, upon the same point, Sawyer *v.* Proctor, 2 Vt. 580; Van Ness *v.* Forrest, 8 Cranch, 30.

It seems to be established, both in England and in this country, that, if the partnership affairs are so nearly adjusted that there remains but a single item to liquidate, one partner may maintain an action against his copartner for a balance due him growing out of the partnership transactions, such balance being so far final as to remove the difficulty as to partnership. Robson *v.* Curtis, 1 Stark. 78; Borill *v.* Hammond, 6 B. & C. 149, per Bayley, J., *dissentiente;* Musier *v.* Trumpour, 5 Wend. 274; Westerlo *v.* Evertson, 1 id. 534; Gibson *v.* Moore, 6 N. H. 549; Clark *v.* Dibble, 16 Wend. 603; Byrd *v.* Fox, 8 Mo. 574; Brubaker *v.* Robinson, 3 Penn. 295; Van Amringe *v.* Ellmaker, 4 Barr, 283.

(*h*) Henly *v.* Soper, 8 B. & C. 16, 20. See Gibson *v.* Moore, 6 N. H. 547; Brierly *v.* Cripps, 7 C. & P. 709; Preston *v.* Stratton, 1 Anst. 50; Wray *v.* Milestone, 5 M. & W. 21.

(*i*) Winter *v.* White, 3 J. B. Moore, 674. See Burnell *v.* Minot, 4 id. 340.

(*j*) Brinley *v.* Kupfer, 6 Pick. 179. See cases at end of preceding note, and Sikes *v.* Work, 6 Gray, 433; Frink *v.* Ryan, 3 Scam. 322.

(*k*) Williams *v.* Henshaw, 12 Pick. 378.

existence of outstanding debts ought not, of itself, to defeat the right of a partner to an action at law, if every thing but these debts is settled and determined, and he is willing either to take them all at their face, or allow and transfer them all to his partner as of no value whatever. (*l*)

If the accounts have been settled, and one partner can prove that he paid too much to the other, by some mistake or ignorance of fact or of accounting, there would not seem to be any reason — unless one should grow out of the peculiar circumstances of the case — to prevent him from recovering, at law, what he has thus overpaid. (*m*)

(*l*) Rockwell *v.* Wilder, 4 Metc. 556, 561. The existence of outstanding debts due the firm will not necessarily defeat an action of assumpsit between partners for a balance, if the plaintiff show that the outstanding debts are incapable of collection, and thus that the judgment rendered will make a final settlement between the partners. And in such case, especially if an assignment of all the outstanding debts be seasonably given or tendered to the other party, the action may be sustained. Per Morton, J., in Williams *v.* Henshaw, 11 Pick. 79.

(*m*) Bond *v.* Hays, 12 Mass. 34; Chase *v.* Garvin, 19 Me. 211. If an account between partners has been stated, in which there is a manifest error in the figures, or in the principles upon which it is adjusted, the amount really due to the injured party may be recovered in assumpsit, leaving the dissolution and settlement otherwise unaffected. But where there is no actual adjustment of accounts, and one partner purchases the interest of another for a gross sum, but the purchase is affected by fraud, the defrauded partner may wholly avoid the contract, and have the accounts reopened; but his remedy is in equity. Chase *v.* Garvin, *supra*.

Upon the principle stated in the text, if, after the dissolution of a partnership, settlement of the accounts, and division of the profits, some of the former partners, from causes arising subsequently to the dissolution, are compelled to incur heavy expenses on the account of the former partnership, an action would apparently lie by them, against the other partners, to recover their proportion of such expenditure. Graham *v.* Robertson, 2 T. R. 282. See Kennedy *v.* M'Fadon, 3 Harris & J. 194. So if a partnership has been dissolved, and the partnership accounts adjusted, and one partner is afterwards obliged to pay an outstanding claim not provided for, he may maintain assumpsit against his copartner for the proportion of it which the latter ought to pay by reason of his joint liability. Brown *v.* Agnew, 6 Watts & S. 235, 238. See Dickinson *v.* Granger, 18 Pick. 315, 317; Kelley *v.* Kauffman, 18 Penn. St. 351. But an agreement between two partners after dissolution, to the effect that they would "quit even" to avoid the expenses of a chancery suit, does not authorize one to maintain an action at law against the other to recover contribution for a partnership debt subsequently paid. De Jarnette *v.* McQueen, 31 Ala. 230. See Fanning *v.* Chadwick, 3 Pick. 420. [One partner may sue another for money advanced, if the transaction be single; not involving the rights of creditors, or an adjustment of partnership accounts. Russell *v.* Grimes, 46 Mo. 410; Finlay *v.* Stewart, 56 Penn. St. 183. See also Wells *v.* Simonds, 51 How. (N. Y.) Pr. 48. Or for his share of the declared profits, if by mutual agreement one partner is made general manager, and

*In New Hampshire, it is provided by statute that *285 "any copartner or joint owner may maintain an action of assumpsit, against one or more of his copartners or joint owners, to recover his just share of any goods or chattels, choses in action, or the proceeds thereof, received by such copartners or joint owners, and not accounted for, delivered, paid, or otherwise settled for on demand." (*n*)

If, in the articles of partnership, or even independently of them, one partner covenants with another that he will account, it seems clear that an action of covenant lies for a breach. (*o*) And it was said, some years since, in Massachusetts, that assumpsit would lie on such a promise between partners. (*p*) We think that such an action would be maintained now everywhere.

3. *Of a Demand for Contribution.*

A difference has been made between an action at law between partners for contribution, and those we have been considering, for which it is not easy to see sufficient reason. Courts, at least in England, seem to have held, or judges have said, that a partner who has paid money for the partnership, may, generally, sue his copartners for contribution. (*q*) This is the more

is from time to time to pay over declared dividends of profit to the others. Wadley *v.* Jones, 55 Ga. 329. Or for his share of the assets after dissolution and actual division. Hunt *v.* Morris, 44 Miss. 314; Dakin *v.* Graves, 48 N. H. 45. Or for money paid on a firm debt, which, on dissolution, the other partner had agreed on receipt of the assets to pay. Hinkie *v.* Reid, 43 Ind. 300. Or for a sum agreed by one partner to be paid to the other, for his interest in the concern. Wells *v.* Carpenter, 65 Ill. 447.]

(*n*) Revised Statutes of New Hampshire, ch. 180, § 4, p. 358.

(*o*) Foster *v.* Allanson, 2 T. R. 479; Want *v.* Reece, 1 Bing. 18; Owston *v.* Ogle, 13 East, 538; Duncan *v.* Lyon, 3 Johns. Ch. 362; Bailey *v.* Starke, 1 Eng. 191. See Niven *v.* Spickerman, 12 Johns. 401.

(*p*) Wilby *v.* Phinney, 15 Mass. 120.

(*q*) The rule usually laid down upon this point is, that contribution may be obtained in an action of assumpsit by one partner against another, for money laid out for the defendant's use. But it has always rested rather upon the *dicta* of eminent judges than upon the authority of adjudged cases, and, in the general form in which it has been customary to state it, may be considered as no longer supported even by the weight of English authority. See Abbott *v.* Smith, 2 W. Bl. 947. Other cases and *dicta* which are sometimes cited in support of the right to contribution between partners, we have already referred to; and they are, we think, better explained upon other grounds. See Wright *v.* Hunter, 5 Ves. 792; *ante*, p. *271 and note; Holmes *v.* Williamson, 6 Maule & S.

*286 remarkable, because the whole * doctrine of contribution is originally only equitable. Every reason against other actions at law, between copartners, would seem to apply to those for contribution. One partner pays money to-day, and another to-morrow; and the only way of determining the questions which might arise from such payments would seem to be, to credit the paying partner with the amount he pays, and give this item its due place and weight in the general account of the partnership. We find but little, or rather nothing, in American jurisprudence, (*r*) and nothing in the reason of

159; Blackett *v.* Weir, 5 B. & C. 385, 388; Evans *v.* Yeatherd, 2 Bing. 133; Wooley *v.* Batte, 2 C. & P. 417, is, perhaps, the most direct adjudication in favor of contribution at law between partners. See Milburn *v.* Codd, 7 B. & C. 419, per Bailey, J.

Mr. Gow, in the first and second editions of his work on Partnership, laid down the rule that, "in an action of assumpsit, for money paid to his use, one partner may enforce from his copartner contribution towards a debt, which the single partner may have discharged, but for which the firm were jointly liable." Gow on Part. (2d ed.) 90. In the subsequent editions, however, the rule is greatly qualified, and its operation restricted to the case of partners in a single transaction. For the rule in its changed and limited shape, he cites numerous cases. Abbott *v.* Smith, 2 W. Bl. 947; Merryweather *v.* Nixon, 8 T. R. 186; Evans *v.* Yeatherd, 2 Bing. 133; Herries *v.* Jamieson, 5 T. R. 556, per Lord Kenyon; Ansell *v.* Waterhouse, 6 Maule & S. 390, per Bayley, J.; Holmes *v.* Williamson, id. 158; Carlen *v.* Drury, 1 Ves. & B. 157; Wright *v.* Hunter, 5 Ves. 792; Burnell *v.* Minot, 4 J. B. Moore, 340. But these cases seem to be very far from establishing the proposition for which they are cited. In some of them are to be found *dicta* of judges asserting the general right of contribution between joint defendants; in some contribution is actually enforced, but between persons who are not partners, but simply joint contractors, or otherwise jointly connected; while in others the question before the court is the competency of a witness, his competency depending upon his liability to contribute, *either in law or in equity*, to a demand which his testimony establishes. The distinction, if any, which these cases suggest, is one between persons who are simply joint contractors, and between those who hold to each other the closer relation of partners; that is, it is between parties who are partners, and those who are not, and not between different kinds of partners. And the difference as to the right of contribution, between those who are partners and those who are merely co-debtors or co-contractors, as well as the reason for it, is obvious. They are thus stated by the court in White *v.* Harlow, 5 Gray, 463, 468: "Where two independent parties owe a joint debt, and one pays the whole, which he may be compelled to do by the creditor, the law, in the absence of any express agreement of such debtors, implies a promise of the co-debtor, to him who has thus paid the whole, to pay him one-half of the common debt thus discharged. But, when one partner thus pays the whole debt, the law implies no such promise: it merely authorizes him to charge the whole to the firm in partnership account, of which he will have the benefit, as a credit on settlement of that account, voluntarily, or by a suit in equity."

(*r*) The American authorities, indeed, seem to be against the right of contribution as between partners. And in

the case, to * sustain an action at law by a partner against * 287
his partner for contribution, unless the facts of the case and the whole character of the transaction insulate it from the general accounts of the partnership, and bring it within those reasons which, as we have said, seem to us sufficient to sustain any action at law between partners. (*s*)

this respect no distinction is made between trading and professional partnerships. Westerlo *v.* Evertson, 1 Wend. 532; Gridley *v.* Dole, 4 Mill's Const. 486; Lawrence *v.* Clark, 9 Dana, 257; Kennedy *v.* McFadon, 3 Harris & J. 194; Bracken *v.* Kennedy, 3 Scam. 564; Brown *v.* Agnew, 6 Watts & S. 238; Roberts *v.* Fitter, 13 Penn. St. 265; Haskell *v.* Adams, 7 Pick. 59; White *v.* Harlow, 5 Gray, 463; Morin *v.* Martin, 25 Mo. 360; De Jarnette *v.* McQueen, 31 Ala. 230.

(*s*) As where one partner claims contribution of another in respect of some transaction which has been separated from the partnership accounts; or has arisen after dissolution and settlement; or is a consequence, not of the relations of the partners *inter se*, but of their relations to third persons. Graham *v.* Robertson, 2 T. R. 232; Brown *v.* Agnew, 6 Watts & S. 235; Kelly *v.* Kauffman, 18 Penn. St. 351; *ante*, p. *285 and notes. Or where the parties to the suit for contribution are to be regarded as joint contractors, or in any other light than as partners. Ansell *v.* Waterhouse, 6 Maule & S. 390; Holmes *v.* Williamson, id. 158; Burnell *v.* Minot, 4 J. B. Moore, 340; Edger *v.* Knapp, 6 Scott N. R. 707, 712; Sedgwick *v.* Daniell, 2 H. & N. 319; Forbes *v.* Webster, 2 Vt. 58; Dupuy *v.* Johnson, 1 Bibb, 562. Or where there is a special agreement between partners authorizing one of them to lay out money on partnership account, with a stipulation that they will each contribute, in due proportion, such sums as may be necessary to reimburse him. Brown *v.* Tapscott, 6 M & W. 119; Geddes *v.* Wallace, 2 Bligh, 270; Waugh *v.* Carver, 2 H. Bl. 235; Hutton *v.* Eyre, 6 Taunt. 289; *In re* Webb, 2 J. B. Moore, 500; Murray *v.* Bogert, 14 Johns. 318. There must be actual payment of a joint debt, before one partner can recover contribution. Maxwell *v.* Jameson, 1 B. & Ald. 51; Taylor *v.* Higgins, 3 East, 169; Cumming *v.* Hackley, 8 Johns. 202. See Dunn *v.* Lee, 1 J. B. Moore, 2; Barclay *v.* Gooch, 2 Esp. 571; *Ex parte* Sergeant, 1 Glyn & J. 183. Neither will a suit for contribution be maintained, either at law or in equity, in consequence of a recovery against one partner under a judgment in an action on a tort. Merryweather *v.* Nixon, 8 T. R. 186; Ansell *v.* Waterhouse, 6 Maule & S. 390; Vose *v.* Grant, 15 Mass. 521; Thweatt *v.* Jones, 1 Rand. 328; Dupuy *v.* Johnson, 1 Bibb, 565; Pecks *v.* Ellis, 2 Johns. Ch. 131; Lingard *v.* Bromley, 1 Ves. & B. 114, 117. See also Seddon *v.* Connell, 10 Sim. 79, 86; Attorney-General *v.* Wilson, Craig & P. 1, 28; Miller *v.* Fenton, 11 Paige, 18. As to rights arising from payments of money under illegal contracts, see Aubert *v.* Maze, 2 B. & P. 371; *Ex parte* Bell, 1 Maule & S. 752; Watson *v.* Fletcher, 7 Gratt. 1; Sullivan *v.* Greaves, Park on Ins. 8. See Booth *v* Hodgson, 6 T. R. 405; Tenant *v* Elliott, 1 B. & P. 3; Farmer *v.* Russell, 1 B. & P. 296; Sharp *v.* Taylor, 2 Phillips Ch. 801, 818; Thompson *v.* Thompson, 7 Ves. 473; Anderson *v.* Moncrieff, 3 Dess. Ch. 124. See Edgar *v.* Fowler, 3 East, 222. A partner who redeemed lands of the firm from execution was held entitled to contribution, in Downs *v.* Jackson, 33 Ill. 464.

SECTION III.

OF QUESTIONS BETWEEN PARTNERS COGNIZANT ONLY BY COURTS OF EQUITY.

1. *Demands between Firms having a Common Member.*

*288 *The reasons which have already been given for the refusal of courts of law to sustain generally actions between partners, indicate, with sufficient clearness, the classes of cases in which courts of equity give relief. It may be said that they will give relief wherever law will not, and that it is the general rule that law will not sustain suits between partners. The preceding section may be considered as stating the exceptions to this rule; and all cases which do not come under one or other of these exceptions come under the rule.

One important class of actions, in which suits at law are not maintainable, needs more particular attention. It consists of cases in which one firm has a cause of action against another firm, and there is some one person who is a member of both firms. There can be no action at law between those firms. (*t*)

(*t*) Bosanquet *v.* Wray, 6 Taunt. 598; Mainwaring *v.* Newman, 2 B. & P. 120; Moffatt *v.* Van Milligen, id. 124, note; Jones *v.* Yates, 9 B. & C. 532; Griffith *v.* Chew, 8 S. & R. 30; Portland Bank *v.* Hyde, 2 Fairf. 196; Eastman *v.* Wright, 6 Pick. 320, 321; Graham *v.* Harris, 5 Gill & J. 489; Burley *v.* Harris, 8 N. H. 235; Rogers *v.* Rogers, 5 Ired. Eq. 31; Calvin *v.* Markham, 3 How. (Miss.) 343; Green *v.* Chapman, 27 Vt. 236; Englis *v.* Furniss, 4 E. D. Smith, 587; Haven *v.* White, 39 Ill. 509. Upon the same principle, a plaintiff cannot summon himself, nor can several plaintiffs summon one of their own number, as a trustee, in the process of foreign attachment. Belknap *v.* Gibbens, 13 Metc. 471. See Portland Bank *v.* Hyde, 2 Fairf. 196. And where there are two firms, with a partner common to each, in an action against one of them the other cannot be summoned as trustee; for the reason that the trustee process is a mode of enforcing *by a suit at law* the contract between the trustee and the principal debtor, for the benefit of the creditor of the latter. Denny *v.* Metcalf, 28 Me. 389.

In Pennsylvania, by act of April 14th, 1838, it was enacted that no action by partners or several persons against partners or several persons should abate, nor the action be defeated by reason of one or more individuals being or having been members of both firms, or being or having been of the parties plaintiffs, and also of the parties defendants, in the same suit; the acts and declarations of the partner or persons so being of both the parties, plaintiffs and defendants, to affect each party respectively to the same extent as the acts and declarations of the other partners or persons, plaintiffs or defendants, would affect the respective firms or parties; *provided*, that no act or declaration of the party shall be given in evidence in his own favor to the prejudice of others. For cases

There is a *rule which, though technical, or rather formal, would suffice to prevent it. It is the rule which prevents the same party from being both plaintiff and defendant of record; for then a man would sue himself. We have already remarked that a partnership possesses a kind of personality, and that it is, for many purposes, a kind of corporation. The law of partnership, as it is incorporated into the common law, acknowledges this substantially as the foundation of its whole system; but it never acknowledges it *formally*. The names of all the partners — as a general rule — must be set forth, both as to the plaintiffs and the defendants. They should be described as "copartners, under the name and style of A., B., & Co." But these words, however usual and proper, and, for some purposes necessary, are, in law, words of description; and A., B., & C. can no more sue A., D., & E. than A. can sue A. (*u*) In addition to this technical reason, how- *289

under this statute, or bearing upon it, see Hepburn *v.* Curts, 7 Watts, 300; M'Fadden *v.* Hunt, 5 Watts & S. 468; Tassey *v.* Church, id. 468; McConkey *v.* Rogers, Brightly N. P. 450.

(*u*) Upon the like ground, that the same person cannot in the same suit be both plaintiff and defendant of record, no action can be maintained between one and the firm of which he is a member. See *ante*, p. *268, note (*c*); De Tastet *v.* Shaw, 1 B. & Ald. 664; Neale *v.* Turton, 4 Bing. 149; Teague *v.* Hubbard, 8 B. & C. 345; Chadwick *v.* Clarke, 1 C. B. 700; Westcott *v.* Price, Wright, 220; Tinal *v.* Bright, Minor, 103; Estes *v.* Whipple, 12 Vt. 373; Bracken *v.* Kennedy, 3 Scam. 558, 564; Myrick *v.* Dame, 9 Cush. 248, 254; Homer *v.* Wood, 11 id. 66; Banks *v.* Mitchell, 8 Yerg. 111. Though a partner, payee of a negotiable note made by his firm, cannot sue the makers, his indorsee may recover upon it. Smith *v.* Lusher, 5 Cow. 688; Thayer *v.* Buffum, 11 Metc. 398; Davis *v.* Briggs, 39 Me. 304; Fulton *v.* Williams, 11 Cush. 108, 110. So, if the partnership be payee of a note made by one of the partners, the technical impediment to a suit on the note is removed by actual negotiation, and the holder may claim a valid title through the indorsement of the firm. Per Shaw, C. J., in Parker *v.* Macomber, 18 Pick. 509. See Babcock *v.* Stone, 3 McLean, 172. And where one who is a member of two firms makes a promissory note in the name of one firm, payable to a person who is a member of the other firm, the payee may sue and recover upon it at law; and the admissions of the common member of both firms cannot be given in evidence to defeat a recovery on the instrument. Moore *v.* Lyman, 12 Ohio, 300. See Baring *v.* Lyman, 1 Story, 423. But the assignee of a partner, who is the payee of a *non-negotiable note* made by the partnership, cannot sue on the note, since his assignor could not. Hill *v.* McPherson, 15 Mo. 204. If a firm is the first indorser of a note, the holder, being a partner therein, cannot sue a subsequent indorser on the note: it being a good answer to the suit of the holder, that, as a member of the copartnership, he stands in the relation of a prior indorser. Decreet *v.* Burt, 7 Cush. 551.

ever, it may be said that such suits would frequently involve an intricate combination of interests, to which the processes
* 290 of * law are not adequate. If the plaintiff firm recover, in such a case, A. would receive a sum which he must contribute to raise, and the account might possibly involve all of those of both partnerships. This, with the entire sufficiency of equity for such cases, has doubtless prevented courts or legislatures from annulling or modifying this rule.

It is applied with equal strictness after the death of the partner common to both firms, or of any other partner, and after the dissolution of the partnership in any way. (*v*) The foundation of the rule is, that a party cannot sue himself, because he cannot contract with himself; and, therefore, there never was a valid contract at law between these two firms. (*w*) But an action may be maintained on any transactions subsequent to the death of the common partner, or his withdrawal from either firm. (*x*) So far as this disability is merely technical, it may be doubted whether it exists in the case of a dormant or secret partner. The rule seems to be, that the creditors of a partner are not obliged to include the name of a secret partner among the defendants. (*y*) There is an obvious

(*v*) Bosanquet *v.* Wray, 6 Taunt. 598; De Tastet *v.* Shaw, 1 B. & Ald. 664; Burley *v.* Harris, 8 N. H. 235; Portland Bank *v.* Hyde, 2 Fairf. 196. See Englis *v.* Furniss, 4 E. D. Smith, 587. And in Ohio, a surviving partner cannot maintain proceedings *in rem* for supplies furnished by the copartnership to the vessel of his copartner; the water-craft law of that State not creating a new, artificial person, with capacity to contract, but merely giving an accumulative remedy against the owner himself. Thompson *v.* Steamboat J. D. Morton, 2 Ohio St. 26. See Miller *v.* Andres, 13 Ga. 366.

(*w*) Rose *v.* Poulton, 2 B. & Ad. 822.

(*x*) Bosanquet *v.* Wray, 6 Taunt. 598.

(*y*) It was *held*, in one case, Dubois *v.* Ludert, 5 Taunt. 609, that if a plaintiff sues a defendant, with whom alone he believes he has contracted, but who in truth has a dormant partner, the defendant may plead in abatement that his partner ought to be joined, unless it be shown that the interest of the plaintiff is thereby materially altered, and that it is no injury to the plaintiff to compel him to bring a new action against the two, and to allow them therein to set off a debt contracted by the plaintiff, as the plaintiff believed, to the other partner alone, but in which both partners are in truth equally interested. But this case may now be considered as overruled, and the rule to be, that, if the plaintiff have no means of knowing the existence of the partnership, the partner sued cannot plead in abatement the non-joinder of a dormant partner. De Mautort *v.* Saunders, 1 B. & Ad. 398; *Ex parte* Hodgkinson, 19 Ves. 294; *Ex parte* Norfolk, id. 458; *Ex parte* Watson, id. 462; *Ex parte* Matthews, 3 Ves. & B. 126; Baldney *v.* Ritchie, 1 Stark. 338;

reason for this. Why should the creditor lose a remedy, and the firm acquire a protection, merely by the firm's keeping secret the name of one of them? or why should * the * 291 creditor be bound to place on record a name which he does not know, and is hindered from knowing by his debtors? The rule seems to go further, however. If the creditor knows the name of a secret partner, it would seem that he is under no obligation to make him defendant. (*z*) And there is some reason for this; partly in the advantage of a uniform rule, and much more in the principle that the firm should be estopped from requiring that another should make public what they themselves choose and endeavor to keep private.

But the rule is sometimes said to go still further, even to the converse proposition, that the firm, in their own action, need not name a dormant or secret partner; and, therefore, the want of his name cannot be taken advantage of, by abatement or otherwise. The reasons which apply to the other side of this rule have no application whatever to this. But, as a mere matter of convenience, there is perhaps no objection to this proposition, although we are not certain that the authorities, when well considered, sustain this rule where the firm is plaintiff. (*a*) But to go further: If a firm should seek to sue

Doo *v.* Chippenden, cited in Abbott on Shipping; Sylvester *v.* Smith, 9 Mass. 119. See Cookingham *v.* Lasher, 39 N. Y. (Keyes) 454, and Bird *v.* McCoy, 22 Iowa, 549.

(*z*) If he was unaware of the dormant partner, at the time of making the contract sued upon, he may or may not, at his election, join the dormant partner. *Ex parte* Hamper, 17 Ves. 412; *Ex parte* Liddle, 2 Rose, 36; Grellier *v.* Neale, 1 Peake, 146; Robinson *v.* Wilkinson, 3 Price, 538; *Ex parte* Layton, 6 Ves. 438; Hoare *v.* Dawes, 1 Doug. 371; Wilson *v.* Wallace, 8 S. & R. 55; Page *v.* Brant, 18 Ill. 37; Cleveland *v.* Woodword, 15 Vt. 302; Blin *v.* Pierce, 20 id. 25; Hagar *v.* Stone, id. 106. But if the plaintiff sue only the ostensible members of a firm, and the non-joinder of the rest is objected to, it will be for the jury to say whether, at the time the plaintiff contracted, he knew or had the means of knowing that others were jointly interested with the defendants; or, in other words, to decide with whom the contract was intended to be made. Stansfield *v.* Levy, 3 Stark. 8; Mullett *v.* Hook, 1 Moody & M. 88; De Mautort *v.* Saunders, 1 B. & Ad. 398; *Ex parte* Layton, 6 Ves. 438; Davies *v.* Hawkins, 3 Maule & S. 488, 492; Bonfield *v.* Smith, 12 M. & W. 405. See Robinson *v.* Wilkinson, 3 Price, 538. Where, by direction of the plaintiff, the writ was served on one only of two partners in trade, when the declaration showed that the plaintiff knew the names of both, and a verdict was obtained upon a plea of non-assumpsit, pleaded by the partner on whom the writ was served, it was *held* that the judgment should be arrested. Shields *v.* Oney, 5 Munf. 550.

(*a*) Skinner *v.* Stocks, 4 B. & Ald.

* 292 another * firm, when one partner in either is a secret partner in the other, because he need not be named in that one, or even if he is secret in both, and, therefore, need not be named in either, we should have much doubt whether such a suit could be maintained against the substantial reasons which oppose it, until it were otherwise determined by adjudication.

And if it be said that, if the partner common to both be only nominal (*b*) in one, or both, having no real interest whatever,

437. See Ross *v.* Decy, 2 Esp. 469, note; George *v.* Claggett, 7 T. R. 361, note; Rodwell *v.* Redge, 1 C. & P. 220; Gordon *v.* Ellis, 2 C. B. 821; Cothay *v.* Fennell, 10 B. & C. 671; Alexander *v.* Barker, 2 Cromp. & J. 133; Robson *v.* Drummond, 2 B. & Ad. 303.

It appears, from the cases just above cited, to be the doctrine of the English cases that the dormant partner may be coplaintiff with the ostensible partner in a suit upon a contract made by the latter upon partnership account. As to the other question, whether in such a case the secret partner must join, or whether the ostensible partner may sue alone, we have already indicated the principles by which, we think, it should be answered. The English cases seem rather to favor the doctrine that the ostensible partner may, if he chooses, sue without joining the secret members of the firm. He is regarded as an agent, contracting, in his own name, for an undisclosed principal, in which case either the agent or the principal may sue upon the contract. Sims *v.* Bond, 5 B. & Ad. 389. See Mawman *v.* Gillett, 2 Taunt. 327; Lloyd *v.* Archbowle, 2 Taunt. 324; Lereck *v.* Shaftoe, 2 Esp. 468; Brassington *v.* Ault, 2 Bing. 177; Steel *v.* Western, 7 J. B. Moore, 31.

In the United States the rule of the English courts has been followed, and it has been generally *held*, that the ostensible partner is the only necessary party plaintiff to a suit to enforce a partnership contract, though the dormant partner may be joined. Mitchell *v.* Dall, 2 Harris & G. 159, 171; Clarkson *v.* Carter, 3 Cow. 84; Hawley *v.* Cramer, 4 id. 717; Clark *v.* Miller, 4 Wend. 628; Boardman *v.* Keeler, 2 Vt. 65; Lapham *v.* Green, 9 id. 407; Morton *v.* Webb, 7 id. 123; Curtis *v.* Belknap, 21 id. 433; Lord *v.* Baldwin, 6 Pick. 352; Wood *v.* O'Kelley, 8 Cush. 406; Wilson *v.* Wallace, 8 S. & R. 55; Barstow *v.* Gray, 3 Greenl. 409; Ward *v.* Leviston, 7 Blackf. 466; Monroe *v.* Ezzell, 11 Ala. 603; Bank of St. Mary's *v.* St. John, 25 id. 566, 621–624; Gregory *v.* Bailey, 4 Harring. 256; Speake *v.* Prewitt, 6 Tex. 252; Jackson *v.* Alexander, 8 id. 109; Keane *v.* Fisher, 9 La. Ann. 70, 74. But when the ostensible and secret partners all sue, on a partnership contract, the defendant may make the same defences, whether by offset or otherwise, as if the action had been brought in the name of the acting partner with whom the contract was actually made. Hilliker *v.* Loop, 5 Vt. 116; Lapham *v.* Green, 9 id. 407; Lord *v.* Baldwin, 6 Pick. 352; Ward *v.* Leviston, 7 Blackf. 466; Rose *v.* Murckie, 2 Call, 409; Beach *v.* Hayward, 10 Ohio, 455. The right of set-off in such cases is provided for by statute in Massachusetts, Gen. Stat. ch. 130, § 9. In New York, since the code, which provides (§ 111) that "every action must be prosecuted in the name of the real party in interest," a dormant partner is a necessary party as a plaintiff in an action for the recovery of a partnership debt, founded on a partnership contract, whether the relief sought be legal or equitable. Secor *v.* Keller, 4 Duer, 416.

(*b*) There are cases which hold that

such a suit may be maintained, we should have some doubt if he * were nominal in both, and more, if he were * 293 nominal in one and actual in the other; because a merely nominal partner is a perfectly real partner as to those parties. It seems to be agreed that, if the action is brought on a written contract, in which all the names are used, the want of interest in one does not sustain an action without him, or an action which makes him both plaintiff and defendant. (*c*) And we should be inclined to think the relation of partnership, and the law springing out of this relation, should have much the same effect as a written contract.

2. *Of the Demand of a Firm Grounded on the Tort of a Member thereof.*

This question has arisen where a firm has a right of action, and the cause of action is, in the whole or in part, the fraud of one of the partners. If A. fraudulently transfers his own property, he cannot, generally speaking, bring any action to recover this property, because he cannot avoid his own act, nor found his right upon his wrong-doing. But if A., of the firm of A., B., & Co., fraudulently transfers the negotiable paper of A., B., & Co., in payment of his own debt, under circumstances which would make the transfer null as to the partnership, it has been objected to the action of A., B., & Co. for the paper, that A. cannot be a plaintiff in such an action and that B. & Co. cannot sue without A. (*d*)

a nominal partner need not join as a coplaintiff in an action on a contract made by the firm. Davenport *v.* Rackstrow, 1 C. & P. 89; Kell *v.* Nainby, 10 B. & C. 20; Harrison *v.* Fitzhenry, 3 Esp. 238; *Ex parte* Alexander, 1 Glyn & J. 409; Atkinson *v.* Laing, 1 Dow. & R. N. P. 16; Bernard *v.* Wilcox, 2 Johns. Cas. 374. See Allen *v.* White, Minor, 365. On the other hand, the nominal partner may be a witness for the plaintiff, if he be clearly shown to have no interest whatever in the concern. Parsons *v.* Crosby, 5 Esp. 199; Davenport *v.* Rackstrow, Kell *v.* Nainby, *supra;* Glossop *v.* Colman, 1 Stark. 25; Teed *v.* Elworthy, 14 East, 210.

(*c*) Guidon *v.* Robson, 2 Camp. 302.

(*d*) Jones *v.* Yates, 9 B. & C. 532. Sykes & Bury being in partnership, Sykes gave the moneys and bills of the partnership in payment of his separate debt, and in fraud of his copartners, the party receiving the property being privy to the fraud. Sykes & Bury having become bankrupt, their assignees brought trover for the bills, and assumpsit for the money. The Court of King's Bench *held*, that the plaintiffs could not recover. The doctrine of Jones *v.* Yates was approved in Greeley *v.* Wyeth, 16 N. H. 10. See Wallace *v.* Kelsall, 7 M. & W. 264, 273; Gordon *v.* Ellis, 7 Man. & G. 607, 622; Brewster *v.* Mott, 4 Scam. 378;

* 294 * But such an objection is wholly technical, nor do we think that even on technical ground it is unanswerable. The law is familiar with instances of a party's name being used by others, for their exclusive benefit, and against his will. An assignee for value of a chose in action so sues in the name of the assignor; and, after notice given of the assignment, the debtor is bound only to the assignee, and the assignor, who is nominal plaintiff, can neither withdraw nor defeat the action, nor release the judgment; having, in fact, no more power over the action, and no more to do with it, than if his name were not used. (*e*) If there be some objection to the application of a similar rule to the case under consideration, there may be less to permitting B. & Co. to sue, on the ground that the fraud of A. removes him from all interest and from the case. Nor are cases wanting which, at least, incline to this view. (*f*)

Even if it should be held that a partner cannot release or assign to his copartner his share of a partnership debt, so as to authorize a suit by the partner alone — a proposition which

Daniel *v.* Daniel, 9 B. Mon. 195; Buck *v.* Mosley, 24 Miss. 170; Goode *v.* McCartney, 10 Tex. 193; Nall *v.* McIntyre, 31 Ala. 532. See opinion of Parker, C. J., in Greeley *v.* Wyeth, 10 N. H. 18, and of Bigelow, J., in Homer *v.* Wood, 11 Cush. 68. [Craig *v.* Hulschezer, 34 N. J. 363.]

In Pennsylvania, where equitable remedies are administered through the medium of common-law forms, the English rule, as laid down in Jones *v.* Yates, has been distinctly denied any operation. Purdy *v.* Powers, 6 Barr, 492.

(*e*) 1 Pars. on Cont. (5th ed.) 230.

(*f*) There are *dicta* to the effect, that in such a case the injured partners could not sue without joining their fraudulent copartner; since, the action being *ex contractu* and the contract joint, the remedy must also be joint, and the partners can have no joint capacity, except when all sue together. See opinion of Lord Tenterden, C. J., in Jones *v.* Yates, 9 B. & C. 539; of Bigelow, J., in Homer *v.* Wood, 11 Cush. 64. In Longman *v.* Pole, Moody & M. 223, Lord Tenterden, C. J., in summing up, said: "I think, in point of law, this action is maintainable; if a person colludes with one partner in a firm to enable him to injure the other partners, I think they can maintain a joint action against the person so colluding." Perhaps, however, this case is distinguishable, on the ground that the action was *case* for a tort. The following case is somewhat more in point. Assumpsit for goods sold and delivered. The defendant's counsel stated that the plaintiff and one Morgan were in partnership together; and that, on a dissolution of that partnership, it was agreed between them that Evans should receive some of the debts, and Morgan the others. This debt was to be paid to Morgan, and the defendant had accordingly paid it to him. They called Morgan to prove this case, and Lord Kenyon held him a competent witness, as the judgment in this cause would not conclude his right. He was examined, and on his evidence the defendant obtained a verdict. Evans *v.* Silverlock, 1 Peake, 21.

we do not think would now be universally held, although an unavoidable inference from the strict and technical rules of the common law — it does not necessarily follow that the same rule would be applied where a partner destroys or loses his right by his fraud. The true objection is, so far as there is any one of substance, that if the firm or the other partners alone recovered, it * would be recovered as the property * 295 of the firm, and the fraudulent party would have his share. It must be admitted that this objection has much weight. But perhaps it might be obviated by reduction or severance of damages, by set-off, or recoupment, or in some other similar way, at law, (*g*) as well as it could be in equity. And it certainly would be a great hardship to deny to the innocent parties any relief, either at law or equity. (*h*)

If a partner bring a bill in equity against the other partners, for a settlement of the affairs of the firm, the fraudulent character of the purpose for which the firm was formed is no defence. (*hh*)

As equity is undoubtedly the principal tribunal for the adjudication of questions arising under the law of partnership, it is perhaps always able to give relief or remedy in cases which justly called for it, and cannot obtain it at law. (*i*) The most frequent instances of actual resort to equity are for a dissolution, or for a sale in the course of settlement by law; for an account, either general or particular, under some specific agreement; for contribution; (*j*) for the enforcement of rights,

(*g*) Daniel *v.* Daniel, 9 B. Mon. 195.

(*h*) "The defrauded partner may, perhaps, have a remedy in equity, by a suit in his own name against his partner and the person with whom the fraud was committed." Per Lord Tenterden, C. J., in Jones *v.* Yates, 9 B. & C. 539. "If a partner, fraudulently or improperly, without the consent of his partners, applies the partnership funds to his own private purposes, or for his own private profit or emolument, or invests the same improperly in his own name and for his own use, the other partners have a right, if they can distinctly trace the investment, and elect so to do, to follow the partnership funds into the new investment, and treat it as trust property held by that partner for the benefit of the firm, and as liable to be accounted for by any person into whose possession the same may come, who is not a *bonâ fide* purchaser for a valuable consideration, without notice." Per Story, J., in Kelley *v.* Greenleaf, 3 Story, 101. See Halstead *v.* Shepard, 23 Ala. 558; Purdy *v.* Powers, 6 Barr, 494.

(*hh*) Harvey *v.* Varney (2 Browne), 98 Mass. 118.

(*i*) See Hamilton *v.* Cummings, 1 Johns. Ch. 517.

(*j*) Wright *v.* Hunter, 5 Ves. 792; Abbot *v.* Smith, 2 W. Bl. 947, 949.

given either by law or by agreement of the partners; for a remedy for wrong done by a partner, or prevention of it by injunction against him; for an injunction against third parties, to prevent them aiding a partner in doing a wrong to the partnership; — sometimes for specific performance of agree-
* 296 ment to enter into partnership; — in general, * for all frauds or mistakes of fact; (*k*) — and in some cases for a manager or receiver of the business or the property of the partnership. Some of these topics we shall consider separately. Here we would remark that the legal maxim, "*de minimis non curat lex*," is applied with a wide meaning in equity. It is a general rule, that good reasons must be given, and facts proved making out a strong case of considerable damage, before equity will interfere. (*l*)

Hence, in a case where five persons, in partnership as coach proprietors, had incurred a partnership debt, which the creditor, after the death of one of the partners, recovered in an action against the survivors, on a bill filed for that purpose against the representatives of the deceased partner, by the partner who had paid the damages and costs of the action, Sir John Leach decreed contribution, not only for the damages, but also for the costs. Thomas *v.* Lichfield, Rolls, H. T. 1831, cited in Collyer on Part. (Perkins' ed.) § 287. See Browne *v.* Gibbins, 5 Bro. P. C. 491, 3 id. 127 (Dublin ed.); Sells *v.* Hubbell, 2 Johns. Ch. 397; Jones *v.* Morgan, 16 Jur. 238.

(*k*) Throughout the whole of this section, we shall constantly meet with illustrations of the interference of equity, wherever fraud taints the intercourse of persons who became partners fairly, and on a basis of mutual good faith. Here we shall only remark that if, in the original agreement of association, there has been fraud, imposition, misrepresentation, or oppression, equity may declare the partnership void *ab initio*. Howell *v.* Harvey, 5 Ark. 270, 278; Tattersall *v.* Groote, 2 B. & P. 135, per Lord Eldon; Hynes *v.* Stewart, 10 B. Mon. 429; Fogg *v.* Johnston, 27 Ala. 432. And the injured party may file a bill for the return of any premium he may have paid for the sake of becoming a partner. Per Lord Eldon, in Tattersall *v.* Groote, *supra*; Pillans *v.* Harkness, Colles P. C. 442; Hamill *v.* Stokes, Daniell, 20, 4 Price, 161. See Evans *v.* Bicknell, 6 Ves. 174, 182; Akhurst *v.* Jackson, 1 Swanst. 89; Colt *v.* Woollaston, 2 P. Wms. 154; Green *v.* Barrett, 1 Sim. 45; Blain *v.* Agar, id. 37. Or for an account and a receiver. *Ex parte* Broome, 1 Rose, 69, 71. See, however, Clifford *v.* Brooke, 13 Ves. 131, and the comments upon the last two cases in 2 Hov. Supp. 327. And he will be restored, as far as possible, to his original situation. Hynes *v.* Stewart, 10 B. Mon. 429; Fogg *v.* Johnston, 27 Ala. 432. See Oldaker *v.* Lavender, 6 Sim. 239. But upon a bill by one partner against his copartners, for an account and his share of the profits, a fraud perpetrated by the plaintiff upon one of his copartners, in a transaction prior to and independent of the partnership, by means of which he procured the funds contributed as his share of the capital of the firm, is no ground for annulling or rescinding the contract of partnership. Ingraham *v.* Foster, 31 Ala. 123. See Stein *v.* Robertson, 30 id. 286.

(*l*) See *post*, ch. 14, § 1, subsection 1.

The principal exception to this rule is in cases of fraud. Where that is clearly proved, a court of equity is usually prompt in suppressing or punishing the fraud, although the amount of injury resulting from it may not be large. (*m*) Perhaps it may be useful to advert to the question, whether money which a partner seeks to recover will be taken from or paid to the funds of the partnership; for this is very generally a test question, which may determine whether the proper remedy is at law or equity. Thus, we mentioned covenant or assumpsit as maintainable on an agreement to pay money before a partnership, and to establish or launch a partnership; but neither of these actions will be sustained, if the * money * 297 when paid is to be paid out of the funds of the partnership, or if recovered is to be added or credited to those funds. (*n*)

It was said in the preceding section that actions at law will lie between partners, in general, on any contract, transaction, or indebtedness which is taken out of and separated from the partnership accounts, before, during, or after the partnership. Now, we have in the question, whether the money is either to come from or be paid to the partnership, or is to remain the benefit or loss of the partner only, and never to appear in the accounts of the partnership, perhaps the best way of determining whether the cause of action is *so* separated from the partnership as to be sufficient for a suit at law.

If a partner files a bill in equity against his copartners, after the termination of the copartnership, it has been held that all the parties are to be regarded as actors; and the decree should settle the partnership concerns between all the partners, as if each had filed a bill against his copartners. (*nn*)

It may be regarded as a general rule, that a bill in equity by a partner for a balance must show a final settlement of the partnership affairs, or ask the court to make such a settlement. (*nnn*)

(*m*) The maxim, *de minimis non curat lex*, "is never applied to the positive and wrongful invasion of another's property." Per Cowen, J., in 5 Hill, 175.

(*n*) Bedford *v.* Brutton, 1 Scott, 245, 261, 262, 1 Bing. N. C. 407; Pearson *v.* Skelton, 1 M. & W. 504. See Andrews *v.* Ellison, 6 J. B. Moore, 199; Caldicott *v.* Griffiths, 8 Exch. 898, 904, per Maule, J.

(*nn*) Raymond *v.* Carne, 45 N. H. 201.

(*nnn*) Williamson *v.* Haycock, 11 Iowa, 40.

SECTION IV.

ON THE METHODS AND PROCESSES OF EQUITY APPLICABLE IN CASES OF PARTNERSHIP.

1. *Of a Decree for Specific Performance.*

A decree for specific performance is one of the important and most frequent means of relief and remedy in equity. We have already spoken of it in reference to a prayer for this relief against one who refuses to carry into effect an agreement for a partnership. In general, it will be applied by equity, as between partners, whenever the performance of a certain duty, or of a distinct promise, is prayed for, which duty or promise the court can enforce or cause to be executed efficiently and adequately, while there is no adequate remedy at law for a breach of it. (*o*)

* 298 * But, as has been already intimated, there must always be duties, as of general good conduct, of skill or care, or the like, which it is impossible for the court to regulate or enforce by a decree; and nothing is done in such cases unless a positive mischief is threatened, which may be prevented or remedied by injunction or other means. (*p*)

(*o*) Thus, equity has enforced an agreement, made upon the dissolution of a partnership, that a particular book used in the trade should become the exclusive property of one of the partners, and that a copy of it should be delivered to the other. Lingen *v.* Simpson, 1 Sim. & S. 600. So if one partner receives moneys, but does not enter the receipts in the partnership books, relief will be granted in equity. Goodman *v.* Whitcomb, 1 Jac. & W. 593. So, if the continuing and incoming partner agree to give the retiring partner their joint and several bond to indemnify him against the debts of the first partnership, it seems that this agreement may be specifically enforced. Warren *v.* Taylor, 8 Sim. 599. An injunction against the breach of a partnership covenant is often equivalent to a decree for specific performance; as where the active members of a firm are enjoined from using, in the joint business, any other than the name agreed upon in the articles as the style of the partnership. See *post*, subsection 4.

(*p*) It was *held*, in quite a number of cases in England, that equity would not prohibit the violation of a negative term in an agreement, unless it had the power of enforcing the positive part of the same agreement, upon the principle that the court should not interfere at all, unless it could administer full and entire relief. Kemble *v.* Kean, 6 Sim. 333; Kimberly *v.* Jennings, id. 340; Baldwin *v.* Useful Knowledge Society, 9 id. 393; Gervais *v.* Edwards, 2 Drury & W. 80. The same doctrine was asserted in the American case of

Thus, if a partner covenants to give his whole business time and attention to the concerns of the partnership, no specific performance would be decreed on a prayer setting forth that he was generally negligent and inattentive. But such a covenant would *be construed as an enforcement of *299 the rule of law, that a partner must not engage in other business which interferes with his duties to the firm or otherwise injures it; and the court would restrain a partner, under such covenant, from engaging in any independent business. (*q*) And if the plaintiff, in his bill for specific performance, or in his separate bill, prays that an account of the profits of this forbidden business may be taken, and a share paid to them, as if it were done on their joint account, equity — supposing the justice of the case upon all its facts so to require — would grant this relief. (*r*)

Hamblin *v.* Dinneford, 2 Edw. Ch. 529. But the later English cases have adopted a different principle. Rolfe *v.* Rolfe, 15 Sim. 88; Dietrichsen *v.* Cabburn, 2 Phillips, 52; Lumley *v.* Wagner, 5 De G. & S. 485, 13 Eng. L. & Eq. 252. It is now held that where a contract contains covenants to do certain acts, and also to abstain from doing certain acts, a court of equity has jurisdiction to restrain the breach of a negative, though it may have no power to compel specific performance of the affirmative covenants; as in the case of an agreement by a musician to sing at a particular theatre, and not to sing at any other, in which case an injunction may be granted against the breach of the latter portion of the agreement. But, *it seems*, that in such cases the court will not interfere, if it is apparent that its jurisdiction cannot be beneficially exercised. Ibid. In Lumley *v.* Wagner, *supra*, all the authorities are reviewed, and the principles governing the question elaborately discussed. See Johnson *v.* Shrewsbury, &c. R. Co., 3 De G., M. & G. 927, 19 Eng. L. & Eq. 584.

The doctrine, that where a contract has both a positive, and a negative term, and the positive term is of such a nature that performance cannot be compelled by equity, it will not interfere to prevent the violation of the negative term, seems never to have been applied to articles of partnership, though "it does not appear why cases of actual partnership should be more favored, in the exercise of the jurisdiction by injunction, than others." Per Lord Cottenham, in Dietrichsen *v.* Cabburn, 2 Phillips, 59. Thus in Kemble *v.* Kean, *supra*, Sir L. Shadwell, V. C., said: "In the case where the parties are partners, and one of the partners contracts that he shall exert himself for the benefit of the partnership, though the court, it is true, cannot compel a specific performance of that part of the agreement, yet, there being a partnership subsisting, the court will restrain that party (if he has covenanted that he will not carry on the same trade with other persons) from breaking that part of the agreement. *That is, in case of a partnership.*" See Morris *v.* Colman, 18 Ves. 437.

(*q*) Kemble *v.* Kean, 6 Sim. 333; Morris *v.* Colman, 18 Ves. 437; *supra*, note (*p*).

(*r*) Somerville *v.* Mackay, 16 Ves. 382; Moritz *v.* Peebles, 4 E. D. Smith, 135.

2. *Of a Decree for a Dissolution, and for an Account.*

We connect these topics, in this section, because a court of equity frequently decrees an account between partners; almost always, however, where there has been or is to be a dissolution of the partnership. Indeed, courts of equity have intimated, with much distinctness, that they would not decree any account, unless there either was a dissolution, or the bill prayed for a dissolution. (*s*) As we have said, this is generally the case in point of fact; and there are reasons as well as high authority for the rule; reasons which, however, may perhaps be summed up in this: that a partner, who is driven to a court of equity as the only means by which he can get an account from his partner, may be supposed to be in a position which will be benefited by a dissolution; in other words, such a partnership as that ought to be dissolved. (*t*)

(*s*) Forman *v.* Homfray, 2 Ves. & B. 329; Waters *v.* Taylor, 15 Ves. 10; Loscombe *v.* Russell, 4 Sim. 8; Knebell *v.* White, 2 Younge & C., Exch. 15. These last two cases have been supposed to overrule the doctrine of Sir John Leach in Harrison *v.* Armitage, 4 Madd. 143, and Richards *v.* Davies, 2 Russ. & M. 347; Camblat *v.* Tupery, 2 La. Ann. 10. One partner cannot demand an account in respect of particular items, and a division of particular parts of the property; but the account must necessarily embrace every thing. Baird *v.* Baird, 1 Dev. & B. 524; McRae *v.* McKenzie, 2 id. 232.

(*t*) In Forman *v.* Homfray, 2 Ves. & B. 330, Lord Eldon placed the reason of the rule upon the ground of convenience, saying: "If a partner can come here for an account merely, pending the partnership, there seems to be nothing to prevent his coming annually." This objection was met by Sir John Leach, Master of the Rolls, in Richards *v.* Davies, 2 Russ. & M. 347, as follows: "It is objected that, if such a suit be entertained, the defendant may be vexed by a new bill whenever new profits accrue; but what right has the defendant to complain of such new bill, if he repeats the injustice of withholding what is due to the plaintiff? Would not the same objection lie in a suit for tithes, which accrue *de anno in annum*?" In Knebell *v.* White, 2 Younge & C., Exch. 21, Alderson, B., remarking upon this point, said: "Then what is the principle? It seems this, that where there is an open account, in which the antecedent items, respecting which the account in equity is sought to be taken, are necessarily connected with, and not capable of being severed from, the other items of the account which are to arise in future, the court will not interpose; for, if it did, it would tolerate the bringing of a suit which could never come to an end till the account itself was closed, for the state of the account would be continually changing whilst it was under discussion and settlement. The party who seeks redress must put it in the power of the court to close finally, by its decree, the dispute between the parties. As soon as he does this, he is entitled to its assistance. In the case of a partnership, therefore, he must pray a dissolution."

* We apprehend, however, that the question is one *300 which is perfectly open to the discretion of the court, and the rule, if there be a rule, goes no farther than the reason of it.

If a partner prays for an account, and his case shows that he has need of one, that it is his only effectual remedy, and that he cannot get it without the aid of the court, but shows also that, as soon as an account is rendered, no sufficient cause of dissolution will remain, and circumstances from which the court could infer that a continuance of the partnership desired by both would be neither injurious nor useless, — in such a case, we know not why a decree for an account should not be rendered; and we have no doubt that it would be by most of our courts, if not by all. (*u*)

(*u*) Perhaps it may now be said that there is no general, or, at least, no universal, rule, to the effect that equity will not decree an account between partners, unless there be dissolution, or a prayer for it. The cases before Lord Eldon, *supra*, p. *299, note (*t*), in which he affirmed the existence of such a rule, may perhaps, be deemed to have turned, in a great measure, upon their own particular circumstances. In Harrison *v.* Armitage, 4 Madd. 143, and Richards *v.* Davies, 2 Russ. & M. 347, Sir John Leach expressly rules, that though the court could not *carry* on a partnership, except with a view to dissolution, yet it might and would, if justice so required and the petitioning partner had no other remedy, decree an account of the past partnership transactions, though there was no dissolution, actual or prayed for. A different principle governed the decision of the court in Loscombe *v.* Russell, 4 Sim. 8, and was approved in Knebell *v.* White, 2 Younge & C., Exch. 15, in both of which cases the opinion attributed to Lord Eldon was followed, as being the sounder and the better established. But the later English cases strongly incline in favor of the opinion of Sir John Leach, and this may now be considered as the received doctrine. In Wallworth *v.* Holt, 4 Mylne & C. 619, 635, 639, Lord Chancellor Cottenham, speaking of the two supposed rules, — "the one binding the court to withhold its jurisdiction, except upon bills praying a dissolution, and the other requiring that all the partners should be parties to a bill praying it," — says: "The result of these two rules would be that the door of this court would be shut in all cases in which the partners or shareholders are too numerous to be made parties; which, in the present state of the transactions of mankind, would be an absolute denial of justice to a large portion of the subjects of the realm, in some of the most important of their affairs. If that were the rule of the court, — if a bill, in no case, would lie to compel a man to observe the covenants of a partnership deed, — it is obvious that a person fraudulently inclined might, of his mere will and pleasure, compel his copartner to submit to the alternative of dissolving a partnership, or ruin him by a continued violation of the partnership contract." See farther Bentley *v.* Bates, 4 Jur. 552; Hills *v.* Nash, 10 id. 148; Walburn *v.* Ingilby, 2 Mylne & K. 61, 76.

In Pennsylvania, it has been decided that a court of equity will entertain a bill for an account by one partner against the other, although the bill

* 301 * In England, an account has been decreed upon a bill praying for the establishment of the partnership. (*y*)

A prayer for dissolution is often made, and the power of equity to grant it for good cause is doubted by no one. This subject, however, has not only a special importance, but some peculiar difficulties; and we propose to treat of Dissolution by Decree, — its causes, methods, and consequences, — by itself.

So, too, equity is often called upon to decree a sale of the partnership property; but, as this would itself amount to a dissolution, or at least arrest the business of the partnership for the time being, and would be an exertion of the power of equity which could never be called for unless where there was or should be a dissolution, we shall consider this subject in connection with that of the dissolution of partnership; not, however, altogether in the chapter on dissolution by process of law; for a sale may also be decreed where the dissolution is by expiration of a limited period by agreement of the partners, or by the death of one or more of them.

Perhaps the aid of equity is not invoked in any cases in which it is more indispensable, or more useful, than when it is asked to settle the accounts between the partners. And it may be well to say something of the principles by which it will be guided in making such settlement.

In the first place, it is perfectly competent for the partners to agree, at their own pleasure, how the accounts shall be settled; and if such agreements are entered into in good faith by all the parties, and are not in themselves oppressive and * 302 injurious, they * will be carefully respected. (*z*) And not only will equity thus regard express agreements how to settle, but will draw from the words, or from the acts of the

does not contemplate a dissolution of the partnership. Hudson *v.* Barrett, 1 Pars. Sel. Cas. 414. See Pirtle *v.* Penn, 3 Dana, 240, 248.

(*y*) Knowles *v.* Houghton, 11 Ves. 168.

(*z*) Jackson *v.* Sedgwick, 1 Swanst. 469. And this remains true, though the articles containing the provision respecting the mode of taking the accounts be not actually executed by the parties. As where articles were entered into for a partnership, and, two of the partners being esquire beadles of the University of Cambridge, it was agreed to conceal the partnership from the University, and therefore that the articles should not be executed. Lord Cowper decreed an account of the partnership according to the terms of the draft of the articles, so far as the same were reduced to a certainty. Worts *v.* Pern, 3 Bro. P. C. 548.

parties, considered in connection with all the circumstances, whatever inference or information it can as to their original or subsequent intention and understanding, and will, on the same condition that this method be honest and not injurious, carry it into effect. Thus, if there have been many settlements, or even one, previously made between the partners, if this be not now objected to by either of them for good cause, and be not itself obviously and considerably objectionable, the court will be disposed to adopt this as an example and precedent, and direct the future accounts to be made up on the same principle. (*a*)

If it be necessary, equity will, on sufficient proof, compel the production of concealed articles, or agreements as to the method or principles of accounting; or, if they are ascertained, but cannot be produced, will order an account to be taken in conformity with them. The topic of "account" has, however, so much extent and importance in the law of partnership, that we propose to consider it in a chapter by itself.

3. *Of a Decree for an Injunction.*

There is nothing in the practice or principles of equity as to the enforcement of specific rights strictly peculiar to cases of partnership. The essentials to give equity jurisdiction are three: There must be a contract, which may be express or implied, but must be valid at law; there must be an infringement of this contract which is not technical merely, but material and substantial; and the remedy at law must be inadequate. In such cases, a * court of equity will frame its * 303 remedy so as to make it in the greatest degree complete and effectual; and this may be in a positive form, by decree of specific performance, or in a negative form, by injunction. The former having been somewhat considered, we will now treat of the latter.

Injunction is one of the most stringent measures, as well as one of the most efficacious remedies, within the practice or power of equity. It is never made use of on slight or merely

(*a*) Jackson *v.* Sedgwick, 1 Swanst. 460, 469; Pettyt *v.* Janeson, 6 Madd. 146; *ante*, pp. * 238, * 242, and notes.

temporary grounds. (*b*) The reasons against interfering between married parties are regarded — not only in the civil law, to which we have already referred, but at common law — as having some application to partnerships. (*c*) Mere failure or infirmity of temper, disputes, which, however vexatious, are not positively injurious, or other similar troublesome but tolerable grievances, will not induce equity to apply this remedy. Nor will injunction issue where there is reason to believe that it will not be efficacious and entirely remedial; nor in case it will probably inflict an extreme inconvenience, or other mischief, beyond what the character or exigency of the case calls for or justifies. (*d*)

It is said that equity will not interfere, by injunction, where there is only a single breach of a covenant, actual or threatened, or but one or two; and not unless there are many or a series of similar wrong-doings, such as would amount to a course of bad and injurious conduct. (*e*) This may be a rule which would operate as far as the reason of it goes; which is, that for such single breaches the injured party may be left to his remedy at law, while the proper course, in a case of continued bad conduct, is to put a stop to it. But there can be no arbitrary rule that equity will not interfere, by injunction, in a case of a single breach, if, in other respects, the conduct of the defendant calls for, and is suited to, equitable relief. A question has arisen, somewhat analogous to one we had occasion to consider in reference to a prayer for account, which is, whether injunction will be decreed where dissolution is not de-
* 304 creed, or is not asked for. Our general * answer would be the same. But it seems to be much more clearly determined, that neither dissolution nor a prayer for it are a necessary foundation for injunction, than that they are not necessary for an account. (*f*)

(*b*) Goodman *v.* Whitcomb, 1 Jac. & W. 592; Marshall *v.* Colman, 2 id. 266; Wray *v.* Hutchinson, 2 Mylne & K. 235; Henn *v.* Walsh, 2 Edw. Ch. 129.

(*c*) Goodman *v.* Whitcomb, 1 Jac. & W. 592.

(*d*) Smith *v.* Fromont, 2 Swanst. 330.

(*e*) Marshall *v.* Colman, 2 Jac. & W. 266.

(*f*) In Marshall *v.* Colman, 2 Jac. & W. 266, *supra*, note (*e*), it seems to have been questioned by Lord Eldon whether equity would interfere between partners by injunction, unless there was ground for, and the bill prayed a dissolution of, the partner-

It is undoubtedly true, that so extreme a remedy as that of injunction — which entirely arrests the proceedings of the person against whom it is aimed, and utterly disables him as to the subject-matter of it — would seldom issue, unless it were made necessary by a grievance which would suffice for a decree of dissolution, if that were called for, or seemed to be the proper remedy. But not only does this decree issue without dissolution, but its propriety was not questioned, even in a case where the prayer of the bill was for the protection and preservation of the partnership, of which the defendant threatened dissolution. (*g*)

The cases are numerous and varied where injunction has been sought and granted to restrain a partner from making an improper use of the partnership property, credit, or name. This may be by violation of partnership articles, or a breach of a duty imposed by law, or a wrongful act forbidden by law. Thus, if a partner becomes grossly intemperate, or involves the partnership foolishly in debt, or wastes its resources, (*h*) or becomes insolvent, (*i*) * or obstructs or embarrasses or * 305
lessens the partnership business, (*j*) or misapplies its

ship. But in Charlton *v.* Poulter, 19 Ves. 148, note, where the partnership was for an unexpired term, the court restrained the gross personal misconduct of one partner, though there was no prayer for a dissolution before the expiration of the term. The principle of this last case seems to be supported by the opinion of Lord Eldon in Goodman *v.* Whitcomb, 1 Jac. & W. 592. And in Mills *v.* Thomas, 9 Sim. 609, Sir L. Shadwell, V. C., said: "I am of opinion that the court ought to interfere between copartners, whenever the act complained of is one that tends to the destruction of the partnership property, notwithstanding a dissolution of the partnership may not be prayed." See Anderson *v.* Wallace, 2 Molloy, 540; Natusch *v.* Irving, Gow on Part. App. 398, 406; *ante*, p. * 197, note (*x*); Loscombe *v.* Russell, 4 Sim. 11; Henn *v.* Walsh, 2 Edw. Ch. 129; Glassington *v.* Thwaites, 1 Sim. & S. 124, 130, note.

(*g*) An application was made, some years ago, to the court of chancery, for an injunction to inhibit the defendants from dissolving a commercial partnership: the other side proposed to defer it, as not having had time to answer the affidavits; but it was insisted, that this was in the nature of an injunction to stay waste, and that irreparable damage might ensue. At length the court deferred it, the defendants undertaking not to do any thing prejudicial in the mean time. But no doubt arose concerning the general propriety of such an application. Chavany *v.* Van Sommer, cited in 3 Wood. Lec. 416, n., 1 Swanst. 512, n.

(*h*) Mills *v.* Thomas, 9 Sim. 606, 609; Gratz *v.* Bayard, 11 S. & R. 41, 48.

(*i*) Lawson *v.* Morgan, 1 Price, 303.

(*j*) Charlton *v.* Poulter, 19 Ves. 148, n.; *ante*, p. * 304, note (*f*).

property, (*k*) or in any way injurious to the partnership grossly misconducts, (*l*) — equity will not only restrain him from the particular wrongful acts complained of, but, more generally, from using the name of the firm on any negotiable paper, or from contracting any debt for the partnership, or receiving any payment. (*m*) But a disability so general as this would amount to a dissolution of the partnership, and that would in most cases be preferred as the most complete and adequate remedy.

It has even been intimated that equity would interfere in this way if a partner should put himself in a position which lays him under a strong temptation to interfere with the interests or damage the business of the firm. (*n*) Nor do we see any reason why, in a case of this kind, of sufficient magnitude, the court should refuse its interference until something had been done to show that the temptation had been yielded to and wrong actually inflicted.

If a partnership have been dissolved, and either of the partners attempt to carry on the former business for their own benefit, and in a way injurious to the former partners, the injured partners may have an injunction. (*o*) So, if an account has been finally settled between the partners, and one or more of the partners has undertaken to pay all the outstanding debts, or certain specified debts, and to indemnify the other partner, if he be compelled to pay any of these debts, and this other partner, being obliged to pay them or any of them, should obtain and retain money which, by the contract
* 306 of settlement, belongs to the indemnifying * partners, they might bring an action at law for the money so retained. If, however, the settlement and agreement of indemnification could not be used as a defence, or by way of

(*k*) Williams *v.* Bingley, 2 Vern. 278, note; Master *v.* Kirton, 3 Ves. 74.

(*l*) Glassington *v.* Thwaites, 1 Sim. & S. 124; Hood *v.* Aston, 1 Russ. 412. See *post*, p. * 312. As, if a partner removes the partnership books from the place of business of the firm, he will be restrained by injunction from keeping them at any other place. Greatrix *v.* Greatrix, 1 De G. & S. 692.

(*m*) The usual form of the order for an injunction against a partner, is, "that an injunction be awarded against, &c., from entering into any contract or contracts, and from accepting, &c., any bills, &c., *in the name of the copartnership*, &c." Seton's Decrees, 308. See Williams *v.* Bingley, 2 Vern. 278, note.

(*n*) Glassington *v.* Thwaites, 1 Sim. & S. 133. See Burton *v.* Wookey, 6 Madd. 367.

(*o*) De Tastet *v.* Bordenave, Jacobs, 516.

estoppel or set-off or otherwise, equity would interfere and decree an injunction against these proceedings at law. (*p*) Generally, as we have already seen, courts of law would refuse jurisdiction of a question of partnership, where they could not give adequate remedy. And in this country, the more liberal practice of courts of law, and the marked approach of equity and law towards each other, would render unnecessary, perhaps always, such an exercise of the powers of equity. Still, it is clearly within the *system* of equity jurisdiction and action, and the authorities show that this remedy has been applied. (*q*)

If, upon settlement, it is agreed that one or more of the partners shall not exercise or carry on a certain trade within certain limits, and a valuable consideration, either by other agreements, or in any way, is given for this ; or if on submission to arbitrators of the affairs of a partnership for final settlement, an award is made to the same effect, and the partner so inhibited does set up or exercise that trade or business, in violation of the agreement or award, — injunction would issue against him. (*r*) And this has been granted where the inhibition did not appear expressly in the award, but it was proved that the award was made on that basis. (*s*)

So too, if, during a partnership, a partner establishes and carries on a business adverse and injurious to that of the partnership, which, as we have seen, the law forbids him to do, — or even threatens and prepares to do this, — he will be restrained by injunction. (*t*) So if a partner use the name of the firm in any * wrongful way, he will be re- * 307 strained. (*u*) And it is intimated that injunction will

(*p*) Gold *v.* Canham, 1 Cas. Ch. 311, 2 Swanst. 325. Where, on the dissolution of a copartnership between D. & F., D. agreed with F. that F. should take all the stock and effects, and pay all the debts due by the firm, and afterwards F. became insolvent and threatened to dispose of all the partnership property and appropriate the same to his own individual use, leaving the debts unpaid ; upon a bill filed for that purpose, an injunction was granted restraining F. from disposing of the partnership property in a different manner from that stipulated in his agreement with D. Devau *v.* Fowler, 2 Paige, 400.

(*q*) See preceding note.

(*r*) Williams *v.* Williams, 2 Swanst. 253, 1 Wilson Ch. 473, n. ; Harrison *v.* Gardner, 2 Madd. 198 ; *ante*, p. * 261, et seq., and notes.

(*s*) Harrison *v.* Gardner, *supra*.

(*t*) See Burton *v.* Wookey, 6 Madd. 367 ; Coates *v.* Coates, id. 287 ; Long *v.* Majestre, 1 Johns. Ch. 305 ; *ante*, p. * 223, et seq., and notes ; p. * 305, note (*n*).

(*u*) As if he accept or negotiate bills of exchange, in the partnership

issue, if he signs the instruments of the firm with a name which purports to be the name of the firm, but is not so in fact or by the agreement of the partners. (*v*)

Causes for injunction sometimes arise where one of the partners has deceased. We shall presently see that this event always makes, strictly speaking, a dissolution; but it may leave certain rights behind it which will be protected by injunction. Thus, any misapplication of the partnership funds by the surviving partner will be prevented by injunction. (*w*) But there must be sufficient evidence of the fact, or of imminent danger; for a mere apprehension that the surviving partner may abuse his powers will not induce a court to restrain and embarrass him in the exercise of these powers. (*x*) Where the representatives of the deceased do, or propose to do, a wrong to the surviving partners, the latter may have their remedy by injunction. As, if the deceased held a lease, or other real chattel or real estate, in his own name, but actually as partnership property and for the partnership, and his executors propose to hold or apply this as the private assets of the deceased, they will be restrained by injunction. (*y*)

The statute of limitations begins to run at the death of a partner, in favor of his personal representatives against a claim to have an account of profits received by him. (*yy*)

As partners who suffer from misconduct of their copartners may have injunction against them, so they may against third parties who are participant with the partners in the wrong-

name, but not for partnership purposes. *Ante*, p. *305, cases cited in note (*k*); *post*, note (*z*).

(*v*) Marshall *v.* Colman, 2 Jac. & W. 266.

(*w*) Hartz *v.* Schrader, 8 Ves. 317. Thus, upon motion by the representatives of a deceased partner, the surviving partner will be restrained from bringing ejectment upon his title, as surviving lessee of the partnership premises. Elliot *v.* Brown, 3 Swanst. 489, n.

(*x*) Woodward *v.* Schatzell, 3 Johns. Ch. 412; Walker *v.* Trott, 4 Edw. Ch. 38. As to the rights and powers of surviving partners generally, see *post*.

(*y*) Alder *v.* Fouracre, 3 Swanst. 489.

(*yy*) Weisman *v.* Smith, 6 Jones, Eq. 124. [Partners *inter sese* hold partnership effects for each other under an implied trust; and the statute of limitations rests upon their respective claims against each other, in this regard, and begins to run on the occurrence of a breach of trust; and, when one is to collect and pay over the funds, the statute is not set in motion till there is a failure in the performance of that duty. Condrey *v.* Gilliam, 60 Mo. 86.]

doing. Thus, if a partner, in fraud of the firm, makes or accepts or indorses negotiable paper with the name of the firm, but for his own use, injunction against negotiating or using the same will issue against a third party in possession of the note, unless he came into possession of it for value, and in ignorance of its fraudulent origin. (*z*)

* Where a note was made by one who had been a part- * 308
ner of the firm until its dissolution, and who signed it with the name of the firm, it was doubted whether injunction should issue against the holder, because he could make no use of the note at law; it being, in fact, a note without a signature. (*a*) But the better doctrine undoubtedly is, that the use of the partnership name after its dissolution will be prohibited by injunction, because it may not only expose the former partners to a suit at law, but, if they should have been remiss in giving notice of their dissolution, it might, under some circumstances, bind them to the payment of the paper in the hands of an innocent holder for value. (*b*)

(*z*) Hood *v.* Aston, 1 Russ. 412, 415; Jervis *v.* White, 7 Ves. 413. See Master *v.* Kirtan, 3 id. 74; Collyer on Part. § 340, note (1); Newman *v.* Milner, 2 Ves. 483.

(*a*) Ryan *v.* Mackmath, 3 Bro. C. C. 15.

(*b*) As far as Ryan *v.* Mackmath, *supra*, can be regarded as authority for the rule that equity will not restrain the improper use of the partnership name by one of the partners after dissolution, it is no longer law. Lord Chancellor Thurlow there decided that he would not order an instrument to be delivered up and the name to be erased, upon which an action could not be maintained at law. Upon the *same principle*, it has been said that equity would not restrain by injunction the use of the partnership name after dissolution. But the doctrine of Lord Thurlow in Ryan *v.* Mackmath has since been overruled. It is now clearly settled that courts of equity have jurisdiction to order an instrument to be delivered up and cancelled, notwithstanding it be void at law, and, perhaps, even though its nullity be apparent on its face, wherever the circumstances of the individual case render such interference expedient. See Ryan *v.* Mackmath, 3 Bro. C. C. 15 (Perkins' ed.), and notes; Hamilton *v.* Cummings, 1 Johns. Ch. 517, 520; Grover *v.* Hugell, 3 Russ. 432; Hodgson *v.* Murray, 2 Sim. 515, 3 id. 382; Simpson *v.* Howden, 3 Mylne & C. 97, 104; Peirsole *v.* Elliott, 6 Pet. 95; Duncan *v.* Worrall, 10 Price, 31; Thompson *v.* Graham, 1 Paige, 384; Pettit *v.* Shepherd, 5 id. 493; Torrey *v.* Buck, 1 Green Ch. 366; Jones *v.* Perry, 10 Yerg. 59; Maise *v.* Garner, Mart. & Y. 383; Garrett *v.* Miss. & Ala. R. Co., 1 Freem. Ch. 70; Sessions *v.* Jones, 6 How. (Miss.) 123; Leigh *v.* Everhart, 4 T. B. Mon. 379, 380; 2 Story Eq. §§ 698–702; 1 Madd. Ch. 301.

The authority of Ryan *v.* Mackmath not being valid to prevent courts of equity from restraining the use of a partnership name after dissolution, there would seem to be no reason why they should not do this, but, on the other hand, as suggested in the text, strong reason why they should. In

We shall hereafter consider, in a separate chapter, the manner in which the creditors of the firm and of the separate partners may obtain from the property of the firm or of the separate partners the security or payment to which they are entitled. The subject is one of much difficulty as well
*309 as importance. We will *not anticipate it here so far as to inquire what rights of attachment or levy a separate creditor has on the property of the firm, or on the interest of the separate partner who is his debtor, in that property. We will say, only, that if such creditor proceeds, or proposes to proceed, to an interference with the property of the firm — whether by attachment or levy, to which he has no legal right — it would seem to be clear that the firm, and, perhaps, that the joint creditors of the firm, may have such interference restrained by injunction. (*c*)

Webster *v.* Webster, 3 Swanst. 490, n., an injunction to restrain surviving partners from using the name of a deceased partner, in the firm of the trade, was refused. Possibly this case was decided upon the ground that the right to retain the partnership name, considered as an interest of the nature of good-will, survived to the remaining partners. See Lewis *v.* Langdon, 7 Sim. 421.

(*c*) A court of law will not interfere and compel the creditor of one partner to delay satisfying his execution out of the partnership effects till an account can be taken, and the debtor partner's interest ascertained. Parker *v.* Pistor, 3 B. & P. 288; Chapman *v.* Koops, id. 289. But in these very cases it is intimated that relief may be had, by the debtor's partners, or the partnership creditors, by bill in equity. And the true conclusion to be drawn from a view of the English authorities is, that a separate creditor to whom execution has issued for the debt of one partner will be restrained from taking the partnership effects thereon until an account has been taken, and his debtor's interest, which is alone properly subject to the execution, ascertained. Eden on Inj. 31. See Skipp *v.* Harwood, 2 Swanst. 586, 587; Lowndes *v.* Taylor, 1 Madd. 423. Such an injunction will be granted at the suit of the surviving partner, Newell *v.* Townsend, 6 Sim. 419; or of the joint assignees in bankruptcy of the firm, Taylor *v.* Field, 15 Ves. 559; Bevan *v.* Lewis, 1 Sim. 376; Anon., 2 Ca. Ch. 38; and, upon the same principle, the property of the partnership will be protected in equity, whether the proposed interference proceed from assignees for value of one partner's interest from his assignees in bankruptcy, or from his executors or administrators, Taylor *v.* Fields, 4 Ves. 396, 15 id. 559; Barker *v.* Goodair, 11 id. 85; Dutton *v.* Morrison, 17 id. 206–209. And, it seems, that, if, in cases of this nature, execution be satisfied before injunction can be obtained, the court may interfere, and stay the money in the hands of the sheriff; whom the plaintiff should properly make a party by supplemental bill, if the money has come into his hands since the injunction issued, or by the original bill, if the money was in his hands at the time. Franklin *v.* Thomas, 3 Meriv. 225, 234; Hawkshaw *v.* Parkins, 2 Swanst. 549. See Axe *v.* Clarke, 2 Dick. 549. After judgment at law against a firm for a debt, a court of

*How injunction may be obtained, can be ascertained only by a consideration of the processes and practice of equity, which is a topic by itself. It may, however, be proper to remark, in this connection, that, usually, injunction is not *310

equity will not, it seems, at the instance of one partner, grant an injunction to stay execution on the ground that he had retired from the partnership long before the debt was incurred, and that the plaintiff at law was apprised of it; because such circumstances would constitute a good legal defence. Protheroe *v.* Forman, 2 Swanst. 227.

What we have already stated as the doctrine of the English cases, namely, that equity will, by injunction, restrain the judgment creditor of a single partner from satisfying his execution out of the partnership effects, and will compel him to wait till an account has been taken, and the interest of the debtor partner in the joint property definitely ascertained, — has been laid down as the rule very generally by the English text-writers. See 1 Madd. Ch. 132, 189; Gow on Part. [144]; Collyer on Part. § 831 (Perkins' ed.); Eden on Inj. 31. In opposition to this conclusion, however, we have high authority in this country. In Moody *v.* Payne, 2 Johns. Ch. 548, the precise point came before Chancellor Kent, and was decided contrary to the rule we have above supposed to be deducible from the English cases. Judge Story's opinion, on the other hand, is in consonance with the doctrine of the text. Story on Part. § 264. And Chancellor Kent himself, while maintaining that Moody *v.* Payne is in accordance with the weight of authority, seems to intimate that, in his own opinion, the contrary doctrine is founded on the better reason. In 3 Kent Comm. [65], note, he says, after referring to Moody *v.* Payne, and Judge Story's comments thereon: "As I have already observed, the more fit and suitable rule of practice would seem to be, to have the adjustment of the partnership account precede the sale. But the current of authorities, as I read them, is the other way, and they are emphatically so in New York." See, in support of this last remark, Phillips *v.* Cook, 24 Wend. 398, 408; Matter of Smith, 16 Johns. 106, note; Hergman *v.* Dettlebach, 11 How. Pr. 46. The decision in Moody *v.* Payne was also approved and followed in Sitler *v.* Walker, 1 Freem. Ch. 77. See Church *v.* Knox, 2 Conn. 514, 524; Brewster *v.* Hammet, 4 id. 540; Witter *v.* Richards, 10 id. 37, 43. See the opinions of Parker, C. J., in Morrison *v.* Blodgett, 8 N. H. 252, 253, and Dow *v.* Sayward, 14 N. H. 9, 13. See also Hill *v.* Wiggin, 11 Fost. 292.

On the other hand, it was distinctly *held*, in Place *v.* Sweetzer, 16 Ohio, 142, that while partnership goods may be levied upon under execution against one of the partners, for his separate debt, the sale in such case may be restrained by injunction till the interest of the partner is ascertained. And in Cammack *v.* Johnson, 1 Green, Ch. 163, the court intimated its opinion to be to the same effect, though it was not considered necessary to decide the question. So also in White *v.* Woodward, 8 B. Mon. 484. See further Moore *v.* Sample, 3 Ala. 319, 320.

The above are the principal *direct* authorities upon the point under discussion. In none of them, perhaps, is the general principle upon which the question turns thoroughly investigated; and it is evident that the answer to the question must depend upon the right of control over the partnership effects which the creditor of a single partner acquires by a judgment and execution against him. We shall, therefore, refer to this subject again when we come to speak of the remedies of the creditors of individual partners.

issued until after the defendant has answered, or has had a sufficient opportunity to answer. (*d*) The reason is obvious: the court would not apply so stringent a measure on a mere *ex parte* statement or evidence. But it is also obvious that there may be cases — in partnership as well as elsewhere — in which an injunction must be granted at once, in order to be of any use; and where, of course, delay would be the same thing as refusal. On this point the English cases rest, or at least suggest, a distinction which is somewhat technical. If the act which is complained of is waste, or distinctly in the nature of waste, injunction will issue at once, on a bill and affidavits, if they satisfy the courts that there is sufficient
* 311 * cause. (*e*) But, if there be no waste, then there must be delay until an answer is filed. (*f*) We doubt whether this rule has much force, or frequency of application, in England; and, we think, it would have little or none here. Unless, indeed, it should be construed as merely a compendious way of stating the true rule; which must be, that equity will not issue an injunction, unless all the case is in and both sides have been heard; or unless there is enough of statement and evidence before the court to convince them that immediate remedy is demanded, and there is no apparent probability of its working undue mischief. (*g*) In such case, a temporary or preliminary injunction will issue, precisely on the same grounds and in the same way as in cases not of partnership. And this temporary or preliminary injunction will be made only extensive enough

(*d*) Anonymous, 1 Ves. 476; Lawson *v.* Morgan, 1 Price, 303; Adams Eq. (Am. ed.) [355-357]; 3 Daniell's Ch. Pr. (Perkins' ed.) 1886; Hartridge *v.* Rockwell, R. M. Charlt. 264; Ogden *v.* Kip, 6 Johns. Ch. 160, 161.

(*e*) As in case of the insolvency of the active partner, who continues to make contracts in the name of the partnership. Lawson *v.* Morgan, 1 Price, 303. See Peacock *v.* Peacock, 16 Ves. 51; Hartz *v.* Schrader, 8 Ves. 317; Chavany *v.* Van Sommer, M. T. 10 Geo. 3, 3 Wood. Lec. 416, n., 1 Swanst. 512, n.; Read *v.* Bowers, 4 Bro. 441; Collyer on Part. (Perkins' ed.) § 349, note.

(*f*) "It is a great mistake, and one very commonly made, to imagine that all the numerous cases wherein very much inconvenience, and even loss, may be suffered, by consequence of the acts sought to be restrained, are, *therefore*, in the nature of waste." *Per curiam*, Cofton *v.* Horner, 5 Price, 537. See also Littlewood *v.* Caldwell, 11 Price, 97, and Hilton *v.* Granville, 4 Beav. 130.

(*g*) See 2 Story Eq. §§ 959*a*, 959*b*, and Adams Eq. 357, as to the discretion which courts of equity always exercise in the issuing of injunctions, and the care with which the right of all parties will be protected.

to avert immediate and impending danger, and will afterwards be dissolved or modified or made absolute, as shall seem to be proper upon a hearing of the whole case. (*h*)

* When there is a prayer to restrain a partner from *312 acting as a partner until an account and settlement, and also for this account and settlement, and the affidavit filed by the defendant asserts (without contradiction) that the plaintiff has possession of the partnership books, and that the defendant is, for this cause, unable to render a true account, or to put in a full answer, it seems that the bill will be dismissed, although improper conduct on the part of the defendant be not denied. (*i*)

(*h*) A special injunction being usually granted till answer *or* further order (Seton's Decrees, 305, 306; Eden on Inj. 325), a defendant may apply to have it dissolved, not only upon putting in his answer, but upon affidavit before answer. 1 Newl. Ch. Pr. 226; 3 Daniel Ch. Pr. (Perkins' ed.) 1894, 1895. And notwithstanding the general rule, that to obtain or continue an injunction, affidavits cannot be received, in contradiction to assertions positively made by the answer (Eden on Inj. 108, 326; 3 Daniell Ch. Pr. (Perkins' ed.) 1827, 1883, 1884), yet, there being no question of title between the parties (id.; 1 Newl. Ch. Pr. 227; Adams Eq. 356), in cases of waste, and of misconduct of parties analogous to waste, affidavits filed *prior* to the answer may be read against it, as to facts of waste or mismanagement, though it is otherwise as to affidavits filed after the answer. Id.; Smythe *v.* Smythe, 1 Swanst. 252, 254, n.; Norway *v.* Rowe, 19 Ves. 144; Charlton *v.* Poulter, id. 148; Peacock *v.* Peacock, 16 id. 49, 51; Lawson *v.* Morgan, 1 Price, 303; Eastburn *v.* Kirk, 1 Johns. Ch. 444. See Roberts *v.* Anderson, 2 Johns. Ch. 202; Poor *v.* Carleton, 3 Sumn. 81, 82; Smith *v.* Cummings, 2 Pars. Sel. Eq. Cas. 92; Lessig *v.* Langton, Bright. N. P. 191; Renton *v.* Chaplain, 1 Stock. 62. In case of imminent danger of injury to a complainant partner, the court may, after appearance, allow a temporary injunction to issue upon proposed amendments to the bill, granting, at the same time, an order to show cause why the bill should not be so amended, and the injunction continued. Hayes *v.* Heyer, 4 Sandf. Ch. 485. Where both an injunction and a receiver are sought, as in some cases, the injunction may be granted, but the receiver refused. Hartz *v.* Schrader, 8 Ves. 317. The application for the injunction, and the appointment of a receiver, should be made the subject of two successive motions. Lawson *v.* Morgan, 1 Price, 303.

(*i*) Littlewood *v.* Caldwell, 11 Price, 97. But where the bill calls for a discovery which the defendant cannot make completely without seeing the partnership books and accounts, which are not in his possession, but which he believes to be in the hands of the plaintiff, he must put in an answer stating to that effect, and then move the court to stay proceedings against him for not putting in his full answer, until he has been assisted with that inspection. *It seems*, that, in such cases, a motion by the defendant for the production of the books and accounts, *before answer*, will be refused. Pickering *v.* Rugby, 18 Ves. 484. See Kelly *v.* Eckford, 5 Paige, 548, 550; 3 Daniell Ch. Pr. (Perkins' ed.) 2071, 2072.

4. *Of a Decree for a Receiver.*

If an injunction arrests all proceedings on the part of a partner, the appointment of a receiver actually ousts him from all possession and control. This is, therefore, even a more stringent measure than the former. And if a partner prays that a receiver may be appointed, or that some person be authorized to manage the concern and act as a *quasi* receiver, the rule that the prayer will not be granted, unless the case entitle the plaintiff to a dissolution, seems to be quite well settled as a rule of practice. (*j*)

* 313 * It has, perhaps, some exceptions. If a wrong-doing partner seeks to exclude his copartner from any knowledge of the business, or from any share in the management of it, the injured partner may have a receiver to take and keep possession of the property until the courts determine the rights of the partners; and in the mean time the decree may provide for the continuance of the business. It is not, however, to be denied, that strong authorities insist that a receiver can be appointed, without dissolution, only for the most stringent reasons. (*k*)

But, in general, wherever the main purpose of the suit is to compel partners to perform in good faith their own agreements or their obvious duties, and the appointment of a receiver seems necessary to prevent great mischief from being done before the main question can be settled, we presume that such appointment would be made. (*l*)

(*j*) Goodman *v.* Whitcomb, 1 Jac. & W. 589; Oliver *v.* Hamilton, 2 Anst. 453; Waters *v.* Taylor, 15 Ves. 10; Harrison *v.* Armitage, 4 Madd. 143; Richards *v.* Davies, 2 Russ. & M. 347; Smith *v.* Jayes, 4 Beav. 503; Henn *v.* Walsh, 2 Edw. Ch. 129; Garretson *v.* Weaver, 3 id. 385; Roberts *v.* Eberhardt, 1 Kay, 148, 23 Eng. L. & Eq. 245; Walker *v.* House, 4 Md. Ch. 39; Birdsall *v.* Colie, 2 Stock. 63; 1 Barb. Ch. Pr. 662.

(*k*) Wilson *v.* Greenwood, 1 Swanst. 480. See next note, and case of Hale *v.* Hale.

(*l*) See Const *v.* Harris, Turner & R. 496, 517; 3 Dan. Ch. Pr. 1967; Milbank *v.* Revett, 2 Meriv. 405, 406; Glassington *v.* Thwaites, 1 Sim. & S. 130, and note; Roberts *v.* Eberhardt, 1 Kay, 148, 23 Eng. L. & Eq. 245. In Hale *v.* Hale, 3 Mac. & G. 79, 3 Eng. L. & Eq. 191 (see same case, 12 Beav. 414), the general doctrine on this point was said to be, that where it is not the object of the suit to obtain a dissolution of the partnership, but, on the contrary, to continue the partnership, it is not according to the practice of the court to grant, in the course of that

It has indeed been distinctly decided in England, that the absence of a prayer for dissolution is not a sufficient ground for a demurrer to a bill praying for the appointment of a receiver. (*m*)

The far greater number of appointments of receivers occur in cases where a dissolution has taken place, or is necessary, or is intended; (*n*) and one or more of the partners violates either the express agreements or articles of the partnership, or some obvious and certain duty imposed by law. (*o*) The most frequent cause — * and it is one that is, perhaps, * 314 always sufficient — is the taking exclusive possession by a partner of the property or books of the partnership, and his refusal to admit his copartner to his rights as to the property and the business. (*p*) But the same reason and the same

suit, the appointment of a receiver and manager. And the only limitation upon this doctrine adverted to was where a party was so conducting himself that, unless a manager was appointed before the hearing, the partnership concern might, in the mean time, be destroyed. Upon motion for a receiver of a partnership, the court will not determine the questions arising between the partners, the only object then being to protect the assets until the determination of the rights. Blakeney *v.* Dufaur, 15 Beav. 40, 15 Eng. L. & Eq. 76. See Sloan *v.* Moore, 37 Penn. 217.

(*m*) Fairthorne *v.* Weston, 3 Hare, 387.

(*n*) See Fairburn *v.* Pearson, 2 Mac. & G. 144. In this case, Lord Chancellor Cottenham refused, upon motion, to appoint a receiver of a partnership, where the question raised was whether the partnership had been dissolved, but directed an issue to try the fact. See Goulding *v.* Bain, 4 Sandf. 716.

(*o*) Harding *v.* Glover, 18 Ves. 281; Estwick *v.* Conningsby, 1 Vern. 118; Crawshay *v.* Maule, 1 Swanst. 507; Henn *v.* Walsh, 2 Edw. Ch. 129; Gowan *v.* Jeffries, 2 Ashm. 296. But, in accordance with what we have already seen with respect to other modes of equitable interference, a receiver will not be granted on slight grounds. Speights *v.* Peters, 9 Gill, 472; Hammil *v.* Hammil, 27 Md. 679. Dissolution alone is not sufficient, Harding *v.* Glover, *supra;* and there must be more than trifling misconduct, Goodman *v.* Whitcomb, 1 Jac. & W. 589, 593; Const *v.* Harris, Turner & R. 518. Thus a receiver will not be appointed merely because partners quarrel, Texiere *v.* Da Costa in Chancery, Nov. 1815, cited in Collyer on Part. § 354, note; Henn *v.* Walsh, 2 Edw. Ch. 129; nor because an injunction *ex parte* has been granted, Garretson *v.* Weaver, 3 Edw. Ch. 385. And the dissolution which takes place on the refusal of an appointee under a will to become a partner is clearly not a dissolution arising from the exclusion of the appointee by the surviving partner; and will, therefore, be no foundation for a receiver. Kershaw *v.* Matthews, 2 Russ. 62.

(*p*) Wilson *v.* Greenwood, 1 Swanst. 471, 483; Blakeney *v.* Dufaur, 15 Beav. 40, 15 Eng. L. & Eq. 76; Const *v.* Harris, Turner & R. 525. See Norway *v.* Rowe, 19 Ves. 144, 159; Katsch *v.* Schenck, 13 Jur. 668; Peacock *v.* Peacock, 16 Ves. 49; Milbank *v.* Revett, 2 Meriv. 405, 406; Harding *v.* Glover, 18 Ves. 281. See farther

principle apply to any other instance of substantial wrong on the part of a partner, implied or threatened, of such a kind that the court can only prevent it by taking the property and books out of his hand. (*q*)

It is to be observed, however, that exclusive possession alone is not sufficient cause. This may result from the articles, or the agreement, or the plaintiff may not object to it; (*r*)
* 315 for it must * be an injurious and unjustified possession of the books or property. And the ground on which receivers are appointed in such cases is, that every partner has the same perfect right to hold the property and manage the business that every other partner has; and that the violation of this right is one of the greatest wrongs that can be done to a partner. (*s*)

Speights *v.* Peters, 9 Gill, 472; Gowan *v.* Jeffries, 2 Ashm. 296; Wolbert *v.* Harris, 3 Halst. Ch. 605; Hall *v.* Hall, 12 Beav. 414; Boyce *v.* Burchard, 21 Ga. 74. Upon apparently this ground of exclusion, it seems to be *held*, in New York, that if a general assignment to pay creditors has been made by one partner, under circumstances which make it clear that it is the act of one partner only, without the knowledge and approval of the other partners, the assignment may be declared void, and a receiver appointed. See Rutter *v.* Tallis, 5 Sandf. 610; Hayes *v.* Heyer, 3 id. 284, 293, 4 Sandf. Ch. 485; Wetter *v.* Schlieper, 4 E. D. Smith, 707.

(*q*) See Gowan *v.* Jeffries, *supra*, as to when the court will take the joint property out of the possession of the parties, by appointing a receiver. See also Butchart *v.* Dresser, 4 De G., M. & G. 542, 31 Eng. L. & Eq. 121; Geortner *v.* Trustees, &c., 2 Barb. 625, 628; Smith *v.* Jeyes, 4 Beav. 503; Hale *v.* Hale, 4 id. 369.

(*r*) Blakeney *v.* Dufaur, 15 Beav. 40, 15 Eng. L. & Eq. 76; Parkhurst *v.* Muir, 3 Halst. Ch. 307. And where one partner thus has the legal and rightful possession and control of the partnership funds, the court interferes to take them out of his hands with great reluctance, and only for cogent reasons. Walker *v.* Trott, 4 Edw. Ch. 38; Drury *v.* Roberts, 2 Md. Ch. 157; Waters *v.* Taylor, 15 Ves. 10, 15.

(*s*) Gowan *v.* Jeffries, 2 Ashm. 296; Butchart *v.* Dresser, 4 De G., M. & G. 542, 31 Eng. L. & Eq. 121. Hence, where it appeared that each of two joint adventurers was equally entitled to the possession of the joint effects, and one had enjoined the other from receiving or disposing of the same; on the application of the latter, a like injunction was granted against the former, without any proof of insolvency or other special cause for depriving him of the control; and on the latter's motion, also, a receiver was appointed, though his original complaint contained no prayer for a receiver. McCracken *v.* Ware, 3 Sandf. 688. If the partner applying for a receiver has the property in his own possession, there will generally be no ground for appointing one. Smith *v.* Lowe, 1 Edw. Ch. 33; though, if the defendant be insolvent, and persist in negotiating bills of exchange in the partnership name, and in applying the money to his own purposes, a receiver may be appointed. Hoffman *v.* Duncan, 17 Jur. 825, 23 Eng. L. & Eq. 99. Nor will a right to a receiver exist on the part of a partner, *who has practically the sole direction of the business*, merely because the other partner will not co-

In some cases a receiver has been appointed to carry on the business, in order to preserve the good-will until it can be sold. (*t*) And the receiver appointed for this, or, indeed for any purpose, sometimes continues to act for a considerable time, as for one or two or more years. (*u*) But the appointment is in its nature a temporary one. (*v*) Courts sometimes object very strongly to a long continuance of it, and cut it short by order of sale or settlement. (*w*)

A difference must be made in this respect, however. Where the receiver is appointed to wind up a concern, he generally holds possession until a final and completed settlement; and this may require a long period. The receivership of insolvent banks in some instances continues for years, and the settlement of a widely * extended partnership business * 316 may require as much time as that of any bank. But where a receiver has only to hold possession for a definite purpose, and carries on the business to preserve the good-will or for any similar object, the court will hasten the completion of his duty and the discharge of his appointment as much as they can without doing harm.

The application for a receiver is always addressed to the discretion of the court; and is therefore answered very differently, as the merits of the case, or the objections to such appointment, affect the court. (*x*) In England, it was said in one case, and

operate with him. Roberts *v.* Everhardt, 1 Kay, 148, 23 Eng. L. & Eq. 245.

(*t*) Martin *v.* Van Schaick, 4 Paige, 479. In this case, where the partnership was in a political newspaper, the good-will constituted a chief part of the value of the joint property. See Williams *v.* Wilson, 4 Sandf. Ch. 379.

(*u*) See Crane *v.* Ford, Hopkins, 114.

(*v*) Waters *v.* Taylor, 15 Ves. 10; Const *v.* Harris, Turner & R. 496, 518; Goodman *v.* Whitcomb, 1 Jac. & W. 592; Martin *v.* Van Schaick, 4 Paige, 479; Wolbert *v.* Harris, 3 Halst. Ch. 605.

(*w*) Crane *v.* Ford, *supra*, where, the owners of a steamboat being in litigation, a receiver had been appointed under whom the vessel had run for two years; a third season approaching, and it being necessary to fit out the vessel, or to let it lie useless, the court thought it highly inconvenient and unfit that such operations should be conducted under its direction for so long a time, and ordered a sale. [A receiver appointed by the courts of one State has no power to act in a foreign jurisdiction. Harvey *v.* Varney, 104 Mass. 436; Booth *v.* Clark, 17 How. (U. S.) 322.]

(*x*) The discretion which the courts exercise in the appointment of a receiver is well illustrated in those cases where *ex parte* applications are made. As a general rule, a receiver will not be appointed until after the defendant has answered. Holden *v.* McMakin,

that a case of embezzlement, that a receiver would not be appointed but on the most extreme and gross abuse, because it would destroy the business. (*y*) This would be a good reason where the appointment would have that effect, and where a closing of the business is not desired. (*z*)

But, on the other hand, it seems to be understood in this country, (*a*) and certainly in New York, (*b*) that whenever
* 317 partners *are wholly unable to agree among themselves as to the disposition and control of the property and business, and neither consents to the possession and control which the other claims or desires, a receiver will be appointed on application, almost as a matter of course, and as a first step towards a final settlement of the affairs of the partnership. (*c*)

1 Pars. Sel. Cas. 284; 3 Dan. Ch. Pr. (Perkins' ed.) 1974. But in urgent cases, where it appears to the court that the merits of the case, as shown by the affidavits, require the *immediate* appointment of a receiver, the court may do so upon the plaintiff's motion before answer. Wilson *v.* Greenwood, 1 Swanst. 483; Duckworth *v.* Trafford, 18 Ves. 283; Gowan *v.* Jeffries, 2 Ashm. 296; 3 Dan. Ch. Pr. (Perkins' ed.) 1974. So also it is clear that, as a general rule, a receiver ought not to be appointed until after notice to all the interested parties, unless the court can see that delay would work irreparable injury to some or all of the parties, when a receiver may be appointed without notice. People *v.* Norton, 1 Paige, 17; Williamson *v.* Wilson, 1 Bland, 418; Gowan *v.* Jeffries, *supra*, 3 Dan. Ch. Pr. (Perkins' ed.) 1975, n.; 1 Barb. Ch. Pr. 667, 669; Edw. on Receivers (Rev. ed.), 13–16.

(*y*) Oliver *v.* Hamilton, 2 Anst. 453.

(*z*) Waters *v.* Taylor, 15 Ves. 10. See Madgwick *v.* Wimble, 6 Beav. 495.

(*a*) See Speights *v.* Peters, 9 Gill, 472; Williamson *v.* Wilson, 1 Bland, 418, 426; Walker *v.* House, 4 Md. Ch. 39; Terrell *v.* Goddard, 18 Ga. 664. In Birdsall *v.* Colie, 2 Stock. 63, complainant filed his bill, praying a dissolution of partnership, an account, and a receiver. The bill charged improper conduct on the part of the defendant, the partner. Defendant answered, denying all charges of improper conduct, &c. It was *held*, that *when a partnership is dissolved by mutual consent, or determined by the will of either party*, a court of chancery *will not, as of course*, without any other reason, except that such is the wish of one of the parties interested, assume the control of the business, and place it in the hands of a mere stranger. Otherwise, if the partnership is not determinable at will, and the court is resorted to for the purpose.

(*b*) Law *v.* Ford, 2 Paige, 310; Marten *v.* Van Schaick, 4 Paige, 479; McCrackan *v.* Ware, 3 Sandf. 688; Goulding *v.* Bain, 4 id. 716; Williams *v.* Wilson, 4 Sandf. Ch. 379; Dunham *v.* Jarvis, 8 Barb. 88; Wetter *v.* Schlieper, 4 E. D. Smith, 707.

(*c*) Perhaps the difference which has been supposed to exist between the English and American law on this point (see Gowan *v.* Jeffries, 2 Ashm. 304) is after all rather seeming than real, and arises rather from an apparent contradiction in the terms of the rule, as it has been laid down by the courts of the respective countries, than from any substantial difference in practice. Waters *v.* Taylor, 15 Ves. 10, above cited, note (*v*), was decided upon its particular facts, the subject-matter of the partnership being of a peculiar nature. And the language of

Although one only is acting partner, having the property in his possession, buying and selling, keeping the accounts, &c., a receiver will be appointed to take these things out of his hands, on allegation and evidence that he abuses his powers or neglects his duties, and in either way importantly endangers the interests of his copartners. (*d*)

It is not uncommon for the appointment of receiver to fall upon one of the partners. (*e*) Of course this is not done

Chancellor Walworth may not be irreconcilable with that used by the court in Oliver *v.* Hamilton, 2 Anst. 453, all the circumstances being taken into consideration. In Oliver *v.* Hamilton, a partner applied for a receiver, while the trade was going on; and it does not appear, from the imperfect report of the case which we have, that a dissolution of the partnership was either asked for or desired. If it was not, then it was a case, where, as we have seen (*ante*, p. *313), the court always interferes with great reluctance, both from a regard to the interests of the parties, and because it is no part of its proper jurisdiction to assume for an indefinite period and purpose the carrying on of trade. On the other hand, in Law *v.* Ford, 2 Paige, 310, and Marten *v.* Van Schaick, 4 Paige, 379, the leading New York cases on the subject, a receiver was asked for to wind up the affairs of the partnership, a dissolution having already taken place, or being desired of the court. But where there is a dissolution, then, both in England and the United States, any substantial wrong done or threatened to the joint interests is sufficient ground for the appointment of a receiver. And in neither country will a receiver be granted for slight reasons, merely because there is an apprehension of danger or loss, or because partners quarrel.

(*d*) Jeffreys *v.* Smith, 1 Jac. & W. 298; Crawshay *v.* Maule, 1 Swanst. 495; Bentley *v.* Bates, 4 Younge & C. 182; Winget *v.* Heathcote, cited id. 187; Hart *v.* Clark, 19 Beav. 349, 27 Eng. L. & Eq. 561; Shepherd *v.* Oxenford, Kay & J. Ch. 491. See Roberts *v.* Eberhardt, 1 Kay, 148, 23 Eng. L. & Eq. 245; Norway *v.* Rowe, 19 Ves. 144; Christian *v.* Lenhouse, cited id. 157, 159.

(*e*) Wilson *v.* Greeenwood, 1 Swanst. 471, 484; Waters *v.* Taylor, 2 Ves. & B. 299, 306; Jeffreys *v.* Smith, 1 Jac. & W. 298; *Ex parte* Stoveld, 1 Glyn & J. 303, 307; Blakeney *v.* Dufaur, 15 Beav. 40, 15 Eng. L. & Eq. 76; Brenan *v.* Preston, 2 De G., M. & G. 813, 21 Eng. L. & Eq. 604; Hoffman *v.* Duncan, 18 Jur. 69, 23 Eng. L. & Eq. 99. In Hubbard *v.* Guild, 1 Duer, 662, the court expressed the opinion, "that, in all cases where the dissolution of a partnership is occasioned solely by the *insolvency of one* of the partners, the solvent partner ought to be appointed receiver, when his capacity and integrity are unquestioned." See Freeland *v.* Stansfield, 16 Jur. 792, 13 Eng. L. & Eq. 336. And, in the appointment of a receiver, the recommendations of those most interested, and who are most likely to sustain injury without one, will generally be most regarded. The being a near relation of either party is not in itself an absolute disqualification; but it must be allowed to have its weight when connected with other circumstances. Williamson *v.* Wilson, 1 Bland, 418, 427. The general rule, however, is, that no person should be appointed a receiver who is a party to the cause, and not wholly disinterested in the subject-matter of the suit. 3 Dan. Ch. Pr. (Perkins' ed.) 1971; Edw. on Receivers (Rev. ed.), 473. And though generally, by the order of the court directing the appointment, a proper salary is directed to be allowed the receiver, yet, if he is an interested

* 318 where there * are charges and countercharges, and a conflict of interests and rights. But where a partner prays for a receiver, and the other partner makes no suggestion of wrong against the plaintiff, or of mischief which would arise from his receiving the appointment, there are many obvious reasons for giving it to him. No one knows or ought to know as well as he the condition of the partnership, and what measures are required to preserve or promote its interests. Indeed, his relation to the firm affords the strongest reasons for appointing him, unless there grow out of the same relation stronger reasons against the appointment.

In one case where a partner thus appointed used the money of the partnership in his own business and made profits, the other partner was not permitted to have a share of them. (*f*) It would seem that an extraordinary indulgence was granted to the receiver in that case. Still, the case is not quite similar to those in which a partner, in wrong of the firm, makes money out of a business which belongs to it, or to those in which a surviving partner who by law takes all the effects and has all the power of the partnership, but only for the purpose of settlement, and then continues the business for his own profit. (*g*) Where a partner is receiver to hold the property and business, if he has money of the firm in hand, he may earn interest upon it on his own responsibility (unless prohibited or otherwise directed by the decree), and, as the partnership may

* 319 charge him with the money and with the interest, * and is not liable for any loss of it, it is enough if he allows full interest; always provided nothing in the character of the case or in the appointment makes this use of the money illegal. (*h*)

party, namely, a partner, where the suit is between partners, he will not be permitted to have any salary or emolument. 3 Dan. Ch. Pr. (Perkins' ed.) 1972, 1976, 1984. See cases cited *supra*, in this note.

(*f*) Whitesides *v.* Lafferty, 3 Humph. 150.

(*g*) *Ante*, p. * 314, note (*p*).

(*h*) Whitesides *v.* Lafferty, 3 Humph. 150. It may well be doubted whether this case is consistent with the general and well-established principles which regulate the conduct and liabilities of receivers. We have already seen, *supra*, pp. * 317 and * 318, that, when a person is himself interested in the subject-matter over which he has control as receiver, he will not usually be allowed to derive any benefit or emolument from his position. And see Edw. on Receivers (Rev. ed.), p. 573, 596; and the remarks of Lord Eldon, there quoted, in Shaw *v.* Rhodes, 2 Russ. 539.

If a surviving partner abuses his power, and the representatives of the deceased apply for a receiver, the same principles and rules would be applied as in any case in which one of the partners who has a rightful possession and management makes a wrongful use of his possession. (*i*) If equal protection can be given to the representatives of the deceased, by requiring security from the surviving partner, that order may issue instead of the appointment of a receiver; (*j*) but not necessarily. (*k*) If the surviving partner insists upon carrying on the business, and employing therein the assets of the deceased, the court will interfere, and appoint a receiver, if that seems to be the best remedy. (*l*) Where all the partners are dead, upon a suit between their representatives a receiver will be appointed, almost as a matter of course. (*m*)

An injunction is sometimes granted, or a receiver appointed by the court directly on application and affidavits. Where the parties agree to the person, there can be no objection to this. The * English rule is, to refer the case to a mas- * 320 ter, who will make an appointment, after a hearing of both parties, if they wish to be heard, and will report his appointment to the court for confirmation, unless that be waived or is obviously unnecessary. (*n*) And this we think the

(*i*) Wilson *v.* Greenwood, 1 Swanst. 480; Crawshay *v.* Maule, id. 507; Gratz *v.* Bayard, 11 S. & R. 41, 48; Walker *v.* House, 4 Md. Ch. 39; Jacquin *v.* Buisson, 11 How. Pr. 385, 394; Collins *v.* Young, 28 Eng. L. & Eq. 14; Clegg *v.* Fishwick, 1 Mac. & G. 294. See Hartz *v.* Schrader, 8 Ves. 317; Evans *v.* Evans, 9 Paige, 178; Renton *v.* Chaplain, 1 Stock. 62, 70; Hubbard *v.* Guild, 1 Duer, 662.

(*j*) Estwick *v.* Coningsby, 1 Vern. 118; Higginson *v.* Air, 1 Desaus. 427, 429.

(*k*) In Law *v.* Ford, 2 Paige, 310, where the suit was between living partners, a receiver was appointed, notwithstanding that the partner who was in possession of the partnership books and effects was willing to give security for the faithful application of the effects in payment of the debts.

(*l*) Madgwick *v.* Wimble, 6 Beav. 495; Clegg *v.* Fishwick, 1 Mac. & G. 294; Walker *v.* House, 4 Md. Ch. 39.

(*m*) The ground of the appointment of a receiver in such a case is thus stated by Lord Kenyon, in Phillips *v.* Atkinson, 2 Bro. C. C. (Perkins' ed.) 272: "Where there is a copartnership, there is a confidence between the parties, and, if the one dies, the confidence remains, and he shall receive; but, when both are dead, there is no confidence between the representatives, and, therefore, the court will appoint a receiver." Walker *v.* House, 4 Md. Ch. 39, 43.

(*n*) The master's judgment as to the proper person is never disturbed, unless some substantial objection be shown. If such objection be shown, the court will then refer it back to the master to review his report. 3 Dan. Ch. Pr. (Perkins' ed.) 1976, 1979, 1981; Edw. on Receivers (Rev. ed.),

safer practice, and suppose it to be frequently adopted in this country. (*o*)

The powers and duties of a receiver, when appointed in a suit between partners, are essentially the same as when he is appointed pending a controversy between other parties. He is always the officer of the court, and, as such, takes into his possession the partnership property, (*p*) receives the issues and avails thereof, and is bound to account for such receipts whenever the court requires. (*q*) Not unfrequently he not only receives and gets in outstanding funds, but also superintends and carries on the partnership business. (*r*)

* 321 The rules by which the receiver is to govern his action in any * given instance, and the methods or principles by which, in each particular case, he is to manage and carry on the partnership business and collect and receive and dispose of its funds, cannot be described in general terms. They are, for the most part, dependent upon the decree appointing him; in which his powers and duties are generally defined and enumerated with much minuteness. (*s*)

ch. 4, pp. 95, 96. See Lottimer *v.* Lord, 4 E. D. Smith, 183; 1 Barb. Ch. Pr. 669, 673.

(*o*) In some of the States, as it seems, the court, without any reference, will directly receive and act upon the nominations of the parties of suitable persons for receiver. Williamson *v.* Wilson, 1 Bland, 418, 427; Gowan *v.* Jeffries, 2 Ashm. 296, 307.

(*p*) The general principle as to the property which the receiver will take into possession, by virtue of his appointment, is that he will assume not only every thing liable to be taken under an execution at law, but also every thing that is considered in equity as assets. 3 Dan. Ch. Pr. (Perkins' ed.) 1970; Edw. on Receivers (Rev. ed.), 6. Hence, the receiver of a partnership will take, as part of the assets of the firm, real estate held in severalty by the different partners, but purchased and used for partnership purposes, and paid for with partnership funds. Smith *v.* Danvers, 5 Sandf. 669.

(*q*) 2 Story Eq. §§ 831–833; 3 Dan. Ch. Pr. (Perkins' ed.) 1949, 1976, 1977; Wolbert *v.* Harris, 3 Halst. Ch. 605, 622. A receiver appointed in a partnership suit, even without any formal assignment, becomes trustee of the assets for all the firm creditors; and, while this trust continues, one partner cannot give a preference, nor can a creditor gain one by judgment. Edw. on Receivers (Rev. ed.), 341; Waring *v.* Robinson, 1 Hoff. Ch. 524; Williamson *v.* Wilson, 1 Bland, 418, 435, 436; Walker *v.* House, 4 Md. Ch. 39, 51.

(*r*) *Ante*, pp. * 315, * 316, and notes; 3 Dan. Ch. Pr. (Perkins' ed.) 2006. In the case of Banks *v.* Gould, decided by Chancellor Kent, and cited in Edw. on Receivers (Rev. ed.), 316, et seq., inasmuch as the firm had two establishments, one at Albany and the other in New York, two receivers were appointed. The writer above cited remarks, however, that it may be a question whether the course should not have been to have had one receiver, with liberty to appoint an agent. See cases cited in Edw. on Receivers (Rev. ed.), 324.

(*s*) Smith on Receivers, 186; 2 Story Eq. § 833; 3 Dan. Ch. Pr. (Per-

By the same decree, partners or other persons, who have done or are supposed to threaten wrong, are usually restrained from any acts which would interfere with the duties of the receiver, or in any way render the appointment less useful and effectual. (*t*) In England, we believe, the receiver is not authorized to bring suits at law or in equity, unless merely to collect debts, and not always for that. (*u*) But in this country the power is frequently, not to say generally, given to him, to bring any actions necessary for the proper discharge of his duties, (*v*) and provision is made for the indemnification, out of the effects in his hands, of those in whose names he brings such actions. (*w*)

SECTION V.

OF TORTS BETWEEN PARTNERS.

Pleadings in equity, in a suit between partners, would be more properly considered in a treatise on Chancery Practice and Pleading. Little variation from the ordinary rules and practice seems * to be required by the fact that the * 322 cause of action between the parties arises from their relation as copartners. Some points, which might be considered under this head, are treated of under the particular topics with which they seem to be more particularly connected. Thus, in the chapter on Account, we shall endeavor to show who may file a bill for an account, who must be made parties, and what pleas are held to be a good bar to such a bill, and equity topics are discussed in other places. Here, therefore, we will

kins' ed.) 1987, 1988; Edw. on Receivers (Rev. ed.), 5. See Skip *v.* Harwood, where a receiver was appointed for a brewery, 3 Dan. Ch. Pr. (Perkins' ed.) 1968, note; 1 Dick. 114.

(*t*) See *supra*, Skip *v.* Harwood; and, for a general form of the decree appointing a receiver of a partnership, Edw. on Receivers (Rev. ed.), 341. See also Seton's Decrees, 323.

(*u*) Estwick *v.* Conningsby, 1 Vern. 118; Dacie *v.* John, McCleland, 575; 2 Story Eq. §§ 833, 834; Seton's Decrees, 323.

(*v*) See the remarks of Ames, C. J., 4 R. I. 173, 188. See Iddings *v.* Bruen, 4 Sandf. Ch. 417, 422; Green *v.* Bostwick, 1 id. 185, 186.

(*w*) 3 Dan. Ch. Pr. (Perkins' ed.) 1977, 1991; Edw. on Receivers (Rev. ed.), 136, 342, 343; Seton's Decrees, 323, 324. A receiver cannot maintain an action of trover, in his own name, for partnership effects converted before his appointment: he must sue in the name of the firm. Yeager *v.* Wallace, 44 Penn. 294.

only add, that, if the fact of the partnership is disputed in a suit in equity purporting to be between partners, a court of equity may direct an issue to ascertain the truth; (*x*) and, it seems, may even order that the parties themselves be examined at the trial. (*y*) But such an issue will not be directed, unless the point is very doubtful. (*z*)

So far as there are personal torts, they can hardly have any relation to the partnership; and neither party can be affected in right, obligation, or remedy, by the fact that he is a partner. (*a*) Of torts in relation to the partnership or its property, nearly all will be comprehended either in fraud or waste; for both of which the remedy in equity is prompt and efficacious, (*b*) as we have already seen.

* 323 * Some question may exist whether the rules of law, in cases of tenancy in common, do not apply in this respect to cases of partnership. A tenant in common may maintain trover against a cotenant for a destruction, total or partial, of the common property by him. (*c*) It has been held,

(*x*) Peacock *v.* Peacock, 16 Ves. 49; *Ex parte* Langdale, 18 id. 300; Binford *v.* Dommett, 4 id. 756; Jacobsen *v.* Hennekenius, 5 Bro. P. C. 482, 1 Bro. P. C. (Dublin ed.) 432. In this last case, the issue directed to be tried was whether a party was a real or a nominal partner.

(*y*) De Tastet *v.* Bordenave, Jac. 516. But see, on this point, 2 Dan. Ch. Pr. (Perkins' ed.) 1298.

(*z*) Forster *v.* Hale, 5 Ves. 308, 322; Metcalf *v.* Royal Exchange Ass. Co., Barnard. 343. As to the constitutional right which citizens may have, in the different States, to have matters of fact, alleged in the bill and denied by the answer, tried by a jury, see Sedgwick Const. Law, 542–548; 2 Dan. Ch. Pr. 1289, note (1); Adams Eq. [376], 815, note.

(*a*) Where one partner, by violence, forces his copartner out of the business premises of the firm, and threatens such copartner with violence and danger to his life, if the latter should venture again to enter the premises, and it is necessary for such copartner to enter and use the premises for the purposes of carrying on his ordinary business as partner, the court will permit the latter to exhibit articles of peace against the former. Regina *v.* Mallinson, 16 Q. B. 367, 1 Eng. L. & Eq. 289.

(*b*) The plaintiff and defendant were partners; and it appeared, by the complaint, that the action was brought to recover damages for the fraudulent removal by the defendant of a stock of goods belonging to the firm. An order of arrest was applied for upon affidavits setting forth the fraud. Duer, J., refused to grant the order; holding that the action was not maintainable, and that the plaintiff had no proper remedy but in a suit for an injunction and a receiver. Approved by the court in Cary *v.* Williams, 1 Duer, 667.

(*c*) Buller N. P. 34; 2 Saund. on Pl. & Ev. 1163; Cowan *v.* Burgess, Cooke, 58; Seldon *v.* Hickock, 2 Caines, 167; Tubbs *v.* Richardson, 6 Vt. 442; Hurd *v.* Darling, 14 id. 214; Herrin *v.* Eaton, 13 Me. 193; Guyther *v.* Pettijohn, 6 Ired. 388.

that a sale of the whole, without authority, may be regarded as such destruction. (*d*) But no tenant in common can maintain trover grounded on the mere possession of his cotenant, however exclusive this cotenant insists upon making it, for the technical reason that each tenant in common is entitled to the possession of the property. (*e*) Nor should * we *324

(*d*) The doctrine, as at present settled by the English authorities, is, that the *mere* sale of a chattel by one of two tenants in common is not a conversion for which his cotenant can maintain trover. The disposition of the chattel must be such as amounts to a destruction of it. See Mayhew *v.* Herrick, 7 C. B. 229. In this case, the point was elaborately discussed, and all the leading authorities reviewed. See Higgins *v.* Thomas, 8 Q. B. 908; Jones *v.* Brown, 38 Eng. L. & Eq. 304; Barton *v.* Williams, 5 B. & Ald. 395, 402, 403; Farrar *v.* Beswick, 1 M. & W. 685, 688; Jackson *v.* Anderson, 4 Taunt. 24; Fennings *v.* Grenville, 1 id. 241; Heath *v.* Hubbard, 4 East, 110; Graves *v.* Sawcer, T. Raym. 15; 1 Chitty P. C. 90, 91, 179, note; 2 Saund. Pl. & Ev. (5th Am. ed.) pt. 2, 1164, 1166, 1168. In this country, the rule has been frequently laid down, without qualification, that a tenant in common may bring trover against his cotenant, for a conversion, by a sale, of the entire property held in common. Wilson *v.* Reed, 3 Johns. 175; Hyde *v.* Stone, 9 Cowen, 230, 7 Wend. 354; Tyler *v.* Taylor, 8 Barb. 585; Farr *v.* Smith, 9 Wend. 338; White *v.* Osborne, 21 id. 72; Odiorne *v.* Lyford, 9 N. H. 511; White *v.* Phelps, 12 id. 386; Thomson *v.* Cook, 2 South. 580; Weld *v.* Oliver, 21 Pick. 559; Starnes *v.* Quin, 6 Ga. 84; Rains *v.* McNairy, 4 Humph. 356; Smyth *v.* Tankersley, 20 Ala. 212; Perminter *v.* Kelly, 18 id. 716; Cowles *v.* Garrett, 30 id. 341. See, however, Tubbs *v.* Richardson, 6 Vt. 442; Sanborn *v.* Merrill, 15 id. 700; Pitt *v.* Petway, 12 Ired. 69. Perhaps, however, notwithstanding the language of some cases, and the actual adjudication in others, the rule in this country is, after all, to be considered as substantially the same with the English rule. That is, in both countries, a sale of the common property by one cotenant may be *per se* a conversion, — is always admissible evidence of it, — but is not *necessarily* a conversion upon which trover may be founded, unless it is tantamount to a destruction of the subject of the tenancy. See St. John *v.* Standring, 2 Johns. 468; Mersereau *v.* Norton, 15 Johns. 179; Bell *v.* Lagmans, 1 Monroe, 40; Hinds *v.* Terry, Walker, 80.

(*e*) Co. Litt. 200; Buller N. P. 34; 1 Salk. 290; Holliday *v.* Camsell, 1 T. R. 658; Fennings *v.* Grenville, 1 Taunt. 241; Jones *v.* Brown, 38 Eng. L. & Eq. 304; St. John *v.* Standring, 2 Johns. 468; Mersereau *v.* Norton, 15 id. 179; Gilbert *v.* Dickerson, 7 Wend. 449; Tyler *v.* Taylor, 8 Barb. 585; Weld *v.* Oliver, 21 Pick. 559, 562; Cole *v.* Terry, 2 Dev. & B. 252; Fightmaster *v.* Beasly, 7 J. J. Marsh. 415; Dain *v.* Cowing, 22 Me. 347; Weeks *v.* Weeks, 5 Ired. Eq. 111, 119. See Lowe *v.* Miller, 3 Gratt. 205; Agnew *v.* Johnson, 17 Penn. St. 373. In Illinois, the common-law rule is so far modified by statute as to allow one tenant in common to support trover against a cotenant who assumes exclusive control over the joint property. Benjamin *v.* Stremple, 13 Ill. 466. See 2 Ill. Stat. (1863) 960.

The general principle holds after the bankruptcy of a partner, and his assignees cannot maintain trover against the other partners, their representatives, or assigns. Fox *v.* Hanbury, Cowp. 445; Smith *v.* Stokes, 1 East, 363; Smith *v.* Oriell, id. 368; Salomons *v.* Nissen, 2 T. R. 674, 682.

think that trover would lie by a partner, against his copartner, for constructive destruction by a sale of the whole thing, because, by the law of partnership, a partner has this power of sale. (*f*) Nor should we think it would lie in general for the actual destruction of a thing by a copartner. For, although a partner has no legal right to destroy any thing, — unless by possibility even that should be fairly incident to the business of the partnership, — yet, if he does destroy it, this might be taken as an appropriation by him, to be charged to him on account; and this charge would then be settled like others, only by a settlement of accounts.

It has been held in this country, that detinue may be maintained by a surviving partner against the representatives of a deceased partner, for the books of account of the firm; (*g*) and there is a similar, though perhaps not quite an equal, reason for allowing the same action, by a partner, against a partner who keeps wrongful possession of the books. We deem the reason insufficient in both cases, and the remedy itself unnecessary. Indeed, detinue is almost wholly disused. And the remedies of equity are so completely adequate, wherever a partner is injured by the wrong-doing of his copartner in matters relating to the partnership, that we doubt whether any resort to law in such cases can be necessary, or will be sanctioned by the courts.

(*f*) Montjoys *v.* Holden, Litt. Sel. Cas. 447; Hyde *v.* Stone, 9 Cowen, 230. See Furlong *v.* Bartlett, 21 Pick. 401; Wilson *v.* Reed, 3 Johns. 175, 178.

(*g*) Murray *v.* Mumford, 6 Cow. 441. The ground taken by the court in this case was, that a dissolution of a partnership did not, *ipso facto*, destroy the joint tenancy of the partners in the partnership property, and create a tenancy in common, but the partnership continued, for the purpose of settling the partnership affairs; that, in case of dissolution by death, the surviving partner was entitled to all the choses in action, and other evidences of debt belonging to the firm, and was entitled to the exclusive custody and control of them; that the books of account were incidents to the debts or choses in action; and that whoever was entitled to the one was, of course, to the other. See Clowes *v.* Hawley, 12 Johns. 487. [A bill in equity by one copartner, against one of three other copartners, to recover his share of a sum of money obtained by the other three by mistake in settlement at the time of dissolution, is demurrable for non-joinder of the other two. Johnston *v.* Freer, 51 Ga. 313.]

CHAPTER IX.

OF REMEDIES BY PARTNERS AGAINST THIRD PARTIES.

SECTION I.

OF REMEDIES FOR BREACH OF CONTRACT.

As a general rule, a partnership has the same remedy, and in the same form, against a third party, that one person has against another. (*a*) We need only advert to the exceptions to this rule, or the qualifications it has received. One of these, derived from the principle that no person can sue himself, or, in other words, that the same person cannot be plaintiff and defendant of record, we have already referred to. (*b*)

It must be true, that a firm cannot bring an action against a third party, or any paper, or any indebtedness which has been discharged in any way by one of the firm, so that there is a perfect defence against one of the plaintiffs. (*c*) For, if he

(*a*) If coplaintiffs sue for a debt due to them as partners, they must declare as partners; or, perhaps, it may be sufficient to prove their partnership. Woodworth *v.* Fuller, 24 Ill. 109.

(*b*) *Ante*, p. *289; Bosanquet *v.* Wray, 6 Taunt. 597; Mainwaring *v.* Newman, 2 B. & P. 120; Moffat *v.* Van Millenger, id. 124, n.; Portland Bank *v.* Hyde, 2 Fairf. 196; Englis *v.* Furniss, 4 E. D. Smith, 587; Green *v.* Chapman, 27 Vt. 236; Rogers *v.* Rogers, 5 Ired. Eq. 31; Lacy *v.* Le Brun, 6 Ala. 904; Griffith *v.* Chew, 8 S. & R. 30, 31; Tindal *v.* Bright, Minor, 103; Banks *v.* Mitchell, 8 Yerg. 111; Miller *v.* Thorn, R. M. Charlt. 180; Cole *v.* Reynolds, 18 N. Y. 74 (though otherwise by statute in New York); Eastman *v.* Wright, 6 Pick. 316. [Under the code in Indiana, if a partner refuses to join as plaintiff, he may be made a party defendant. Hill *v.* Marsh, 46 Ind. 218.]

(*c*) A release by one partner is a bar to any action by the firm, even though made *puis darrein continuance*. Phillips *v.* Clagett, 11 M. & W. 84; Rawstorne *v.* Gandell, 15 id. 304; Campbell *v.* Mullett, 2 Swanst. 569; Bristow *v.* Taylor, 2 Stark. 50; Porter *v.* Taylor, 6 M. & S. 156; Arton *v.* Booth, 4 J. B. Moore, 192; Furnival *v.* Weston, 7 id. 356; Salmon *v.* Davis, 4 Binney, 375; Emerson *v.* Knower, 8 Pick. 63; Pierson *v.* Hooker, 3 Johns. 68; Bruen *v.* Marquand, 17 id. 58; Gates *v.* Pollock, 5 Jones, 344; Smith *v.* Stone, 4 Gill & J. 310; McBride *v.* Hagan, 1 Wend. 326; Doremus *v.* McCormick, 7 Gill, 49; Wallis *v.* Wallace, 6 How. (Miss.) 254; Halsy *v.* Fairbanks, 4 Mass. 206. But, as the

*326 must be *one of the plaintiffs, the action cannot proceed if it cannot be maintained by him. Whether this objection passes away when the partner discharging the debt is only dormant and secret, or nominal, is, in fact, the same as that considered before, when treating of the relations of two firms with a common partner. There is this difference, however. A secret partner, who actually is one, or a nominal partner who is set forth as one, may lawfully discharge any debt due to the firm; and, therefore, we should say such an action would not lie, unless the discharge had been fraudulent as against the firm, and the fraud brought home, in some way, to the debtor. As matter of usage and practice, a firm having paper which they cannot sue, because one of themselves would necessarily be plaintiff and defendant, may indorse the paper to a third party, and there seems to be no objection to his bringing an action upon it at law. (*d*)

It has been questioned, in some cases, whether the death of the person who is a partner in both the firms removes the bar to an action between them. This is denied by some authorities; but we have doubts whether there be a positive rule to this effect. (*e*) As the bar of a common partner affects not the contract but the remedy, when the death of the common

authority of a single partner to release or receive payment arises only from the partnership, it is necessarily limited to the partnership scope, in the ordinary methods of business.

(*d*) Davis *v.* Briggs, 39 Me. 304; Thayer *v.* Buffum, 11 Metc. 398; Pitcher *v.* Burrows, 17 Pick. 361; Parker *v.* Macomber, 18 Pick. 509; Temple *v.* Seaver, 11 Cush. 314; Smith *v.* Tustin, 5 Cow. 688; Blake *v.* Wheadon, 2 Hayw. 109; Babcock *v.* Stone, 3 McLean, 172; Heywood *v.* Wingate, 14 N. H. 73. So in Penn *v.* Stone, 10 Ala. 209, though the indorsee was also assignee of the partner's share both of assets and liabilities, and so ultimately liable to contribute; because this did not render him a partner. But, if the note is not negotiable, it is subject to the same defences in the hands of the indorsee as in those of the payee, being a mere assignment of a chose in action. Hill *v.* McPherson, 15 Mo. 204. In Timrall *v.* O'Bannon, 7 B. Mon. 603, the same doctrine is *held*, though it does not clearly appear that the note there was not negotiable.

(*e*) In Bosanquet *v.* Wray, 6 Taunt. 597, it is said, the death of the partner does not remove the bar, as that "goes to the root of the contract." This assertion is repeated by the text writers, Collyer on Part. § 642, Story on Part. § 234, Gow on Part. 119, 120, and in many cases. See De Tastet *v.* Shaw, 1 B. & Ald. 664; Burly *v.* Harris, 8 N. H. 233, 235. See also Addison on Cont. 732; but it does not seem to have been expressly decided until Miller *v.* Thorn, R. M. Charlt. 180. It is not, however, clear from authority or on principle that this rule is universal.

partner removes this technical bar, we should say the survivors might sue. (*ee*) As a general rule, it must be true, that no action can be sustained by a copartnership, properly setting forth the names of the partners, if either of them is disabled from bringing that suit. *And the cases must *327 be few, if any exist, in which the law indulges the firm with suppressing the name of the disabled partner, and so bringing the action. In the case of an alien enemy, the rule seems to be established; and, as a consequence of it, no partnership, of which one member is an alien, can bring, in either of the countries to which the partners belong, any action during a war between those countries. (*f*) How it would be if one partner — all being citizens of one of the belligerents — resided in the country of the other, is a question of some difficulty. The true principle must be, that the rights of the partnership were unaffected by their residence alone, if there were nothing of adherence to the enemy. (*g*) But it might be very difficult to make this distinction applicable, where the foreign residence of the partner was permanent, or even long. (*h*) A different

(*ee*) This is expressly *held* in Lacy *v.* Le Brun, 6 Ala. 904.

(*f*) McConnel *v.* Hector, 3 B. & P. 113; Albretcht *v.* Sussman, 2 Ves. & B. 323; and see O'Mealey *v.* Wilson, 1 Camp. 482. All causes of action which accrued prior to the war are suspended during the war. But, if the cause of action arises during the war, *it seems* that the firm are precluded from suit at any time, if their partner be affected with a hostile character when the contract was made. Thus in Griswold *v.* Waddington, 16 Johns. 438, the plea of alien enemy was *held* a bar to an action brought by a firm after return of peace on a balance accrued during war, one partner — though a native of the country where the suit was brought — being resident in the belligerent country when the balance accrued. And, by the doctrine of the courts both of England and America, it would seem that the right to contract is destroyed *eo instanti* war is declared. See The Venus, 8 Cranch, 253.

(*g*) Collyer on Part. § 647, citing Roberts *v.* Hardy, 3 Maule & S. 533; but see next note.

(*h*) Roberts *v.* Hardy, 3 Maule & S. 533; O'Mealey *v.* Wilson, 1 Camp. 482; The Julia, 8 Cranch, 195; The Rapid, 8 Cranch, 160, 161. In Griswold *v.* Waddington, 16 Johns. 479, Kent, C. J., says of the prohibition of intercourse: "It reaches to all interchange or transfer or removal of property, to all negotiation and contracts, to all communication and all locomotive intercourse; to a state of utter occlusion to any intercourse but one of open hostility, to any meeting but in actual combat." This utter and rigid veto on all intercourse arises *eo instanti* war is declared. See The Venus, 8 Cranch, 253. In 2 Wildman's International Law, 45, it is said that "domicile by residence in the enemy's country is considered as adherence to the enemy, inasmuch as it increases his strength through contribution of taxes and other means, and consequently imposes a hostile character on the person domi-

question, previously adverted to, arises, where, by the law of a foreign land, husband and wife may form a mercantile partnership, or both be members of one. At home, they could, of course, bring any action. But, in England and in this
*328 country, a wife cannot join * with her husband in any such action; and it is said that an action by such a firm cannot be maintained. (*i*) It is, however, possible that the recent legislation of some of our States, giving to the married woman, so far as her property is concerned, almost the *status* of a single woman, might be construed to permit such an action. The rule that, whenever the *lex loci* comes into question, the *lex loci fori* shall determine all questions of remedy, might oppose such an action. But this rule has only been applied to such questions as arise under the statute of limitations, and, perhaps, those of infancy; (*j*) and, on the other hand, the question of disability to make the contract is determined by the law of the place of the contract. On the whole, we should expect that an American court would say, either that the wife might sue with the husband, because of her unquestionable right, at home, or that she could neither sue nor be regarded in this country as a partner, and that her name might be omitted. But the simpler, and certainly the safer, way would be, to indorse the paper over, if it were negotiable, to some third person who could be made plaintiff.

As there is no doubt that a firm can indorse their paper to any third party, who may then sue it, so we suppose it clear that they may indorse it over to one of their number, who may then bring the suit in his own name. (*k*) Nor do we see why

ciled." It should seem, therefore, that mere residence, if it clearly appear, will, if not shown to be compulsory, amount to adherence to the enemy and support the plea of alien enemy.

(*i*) Collyer on Part. § 646, citing Cosio *v.* De Bernales, Ryan & M. 102. There is, however, no case which decides this question. See the next and following notes.

(*j*) Thompson *v.* Ketcham, 8 Johns. 189.

(*k*) Bailey *v.* Lyman, 1 Story, 396; Bolton *v.* Puller, 1 B. & P. 546; Goddard *v.* Lyman, 14 Pick. 268; Russell *v.* Swan, 16 Mass. 314. In Estabrook *v.* Smith, 6 Gray, 570, it was *held*, that a partner might transfer a partnership note by indorsement in the partnership name to his copartner, but could not by an indorsement in his own; though it was argued that to require the name of the copartner as indorser on the note was to compel him to indorse to himself. But it has been *held*, that where the indorsement by the firm was merely colorable, to avoid the objection that the maker was a partner, it was *held* still to be the note of the firm, and that no action

this indorsement may not be made by the partner who is indorsee. It is every day's practice to make a note payable to the maker's own order. There is no such practice of indorsing to the order of the indorser, because he must then indorse again, in order to designate and authorize a third person to bring suit, and this he can do as well at first. But, where there is any reason for a payee's indorsing to his own order, we see no objection to it; and we should * say * 329 there could be none to a partner's writing as indorser the name of the firm, and as indorsee his own. (*l*) This power, however, is confined to negotiable paper. In many of our States, the common law as to choses in action has been materially modified; but, where it remains in force, no partner can transfer and assign his interest in a chose in action to the other partner or partners, so that the transferee may bring his action at law in his own name. (*m*) In equity it would be otherwise; (*n*) but such a transfer, for consideration, would authorize the transferee to use the name of the transferring partner, at law, nor could he interfere with the suit in any way. (*o*)

could be maintained upon it by the indorsee. Tipton *v.* Nance, 4 Ala. 194. If the indorsement be in the name of one partner only, it passes no interest. McIntire *v.* McLaurin, 2 Humph. 71.

(*l*) Burnham *v.* Whittier, 5 N. H. 334; Kirby *v.* Coggswell, 1 Caines, 505; and see Estabrook *v.* Smith, 6 Gray, 570. In Towle *v.* Harrington, 1 Cush. 146, a note was made by one firm to another, there being a common partner in both. After the death of the common partner, the survivor indorsed the note to himself. The indorsement was *held* void, but only because the note survived to him as partner, and his indorsement to himself was null. But a partner's right to indorse with the partnership name the partnership paper to himself seems impliedly admitted.

(*m*) The common law (without statutory provision) has nowhere been so modified that the mere assignee of a chose in action can sue in his own name. A mere assignment, therefore, by one partner to his copartner of a partnership demand, gives no right to the assignee to sue in his own name. Tate *v.* Mut. Fire Ins. Co., 13 Gray, 79; Russell *v.* Swan, 16 Mass. 314, and cases cited in note (*p*), *infra*.

(*n*) An assignee has not, however, a resort to equity, merely because he cannot sue in his own name; for, as courts of law admit him to sue in the name of his assignor, his remedy at law is complete, and equity will not entertain his claim unless inequitable defences are set up in his assignor's name. See 1 Pars. on Cont. (5th ed.) 224, note (*d*), and cases there cited and examined; especially Ontario Bank *v.* Mumford, 2 Barb. Ch. 596.

(*o*) Eastman *v.* Wright, 6 Pick. 316, 322. By the assignment, all property is divested from the assignor, who becomes thereby a merely nominal party, with no interest for a release to act upon, and the release is therefore merely null. Rawstorne *v.* Gan-

It must be the general rule, that all those who were partners at the time a debt was contracted, are those to whom it is due, and they should join in any action to recover the debt. (*p*) And * 330 it is, * moreover, an unquestioned rule, that no agreement between partners can alter the liability or mode of liability of their debtor, without his assent. Thus, by no assignment of a debt due to the partnership by one of the partners, can he acquire the right to sue it in his own name. (*q*) If, however, the assent of the debtor sufficiently appear, and be on a good consideration, an action may be maintained by the partner who is assignee, in his own name. (*r*) When such valid assent is given, the action by the assignee in his own name, is upon a new contract substituted for the old one on principles similar to those of novation; (*s*) the discharge of the debtor from his

dell, 15 M. & W. 304. But notice must also be given the debtor, as without this, which is practically a revocation of the partner's authority to receive or discharge the debt, the debtor has a right to presume each partner still possessed of that authority which the mere fact of partnership confers.

(*p*) Jell *v.* Douglass, 4 B. & Ald. 374; Dob *v.* Halsey, 16 Johns. 34; Hewes *v.* Bayley, 20 Pick. 96; Cushing *v.* Marston, 12 Cush. 431; Gage *v.* Rollins, 10 Metc. 348; Halliday *v.* Doggett, 6 Pick. 359; Pearson *v.* Parker, 3 N. H. 366; Parker *v.* Gregg, 3 Foster, 416; Horbach *v.* Huey, 4 Watts, 455; Allen *v.* White, Minor, 365; Snodgrass *v.* Broadwell, 2 Litt. 353; Wright *v.* Williamson, 2 Penning. 978; Wilson *v.* Wallace, 8 S. & R. 53; Tate *v.* Mut. Fire Ins. Co., 13 Gray, 79; Speake *v.* Prewilton, 6 Tex. 352; Jones *v.* Gates, 9 B. & C. 532; Garrett *v.* Handley, 3 B. & C. 462; Cooke *v.* Seely, 2 Exch. 746; Driver *v.* Burton, 17 Q. B. 989; Greeley *v.* Wyeth, 10 N. H. 15.

(*q*) Huey *v.* Horbach, 4 Watts, 455; Clark *v.* Howe, 23 Me. 560; Degroot *v.* Darby, 7 Rich. 117; Cushing *v.* Marston, 12 Cush. 431; Russell *v.* Swan, 16 Mass. 314; *dictum* in Radenhurst *v.* Bates, 3 Bing. 470; Wood *v.* Rutland Ins. Co., 31 Vt. 552. But it seems to have been thought that on dissolution a sole right of action might vest in remaining partners, without any assent or new promise by the debtor. Collyer on Part. § 658, citing Evans *v.* Silverlock, Peake, 21; Atkinson *v.* Laing, Dowl. & R. N. P. 16. 1 Lindley, Partn. 403, remarks that this case "is more than questionable." We should say that Mr. Collyer's proposition is without authority, and that there is no such exception as "severance by dissolution," to the necessity of joinder of all the partners on a partnership demand. In Louisiana, however, it seems that the liquidating partner on a dissolution of the firm may maintain an action in his own name, only setting forth the fact that the transaction arises out of the business of the firm. White *v.* Jones, 14 La. Ann. 681.

(*r*) Degroot *v.* Darby, 7 Rich. 117; Cook *v.* Beech, 10 Humph. 412; Howell *v.* Reynolds, 12 Ala. 128; McLanahan *v.* Ellery, 3 Mass. 269; Moore *v.* Hill, 2 Peake, 10; Stevens *v.* Lunt, 19 Me. 70, 72; Wood *v.* Rutland Ins. Co., 31 Vt. 552; Aspinwall *v.* Lond. & N. W. R. R. Co., 11 Hare, 325; Armsby *v.* Farnam, 16 Pick. 318.

(*s*) See Pars. on Cont., vol. i. pp. 217–222, 5th ed.

liability to the firm forming the consideration of the new promise. (*t*) Where, however, the assignment is by an old firm to a new one which includes the old, there would seem to be but two parties in question; for the old firm and the new one are one *quoad* this contract, and the promises of discharge of the old liability, and of payment of the new one by the firm and the debtor respectively, are mutually considerations one for the other. (*u*) In like manner a new contract may arise by the implied assent of the debtor, who has paid one or more of several joint creditors * their respective shares, to pay * 331 the other his separate share, and the latter may maintain his separate action therefor. (*v*)

Persons who leave the firm and cease to be partners may transfer the debt so as to retain no interest in it; but still their names should be used. (*w*) On the other hand, those who come into the firm after the debt is created may acquire an interest in it, and the debt will be collected for their benefit; but still their names cannot be used. (*x*) This is true even where the debt was originally contracted with the understanding that it should be a continuing contract, contemplating successive changes in the house, and intended to go through them all and be always a debt to the house, whoever may be its copart-

(*t*) This new promise may be express, as in Howell *v.* Reynolds, 12 Ala. 128, and Wood *v.* Rutland Ins. Co., 31 Vt. 582; or implied, as it was in Cook *v.* Beech, 10 Humph. 412, from the debtor's drawing a bill for the amount of the debt in favor of the assignee; or from his admissions, as in Degroot *v.* Darby, 7 Rich. 117.

(*u*) See Armsby *v.* Farnam, 16 Pick. 318.

(*v*) Garrett *v.* Taylor, 1 Esp. N. P. 117; Kirkman *v.* Newstead, id.; Baker *v.* Jewell, 6 Mass. 460; recognized in Medbury *v.* Watson, 6 Metc. 257; Blair *v.* Snover, 1 Halst. 153; Holland *v.* Weld, 4 Greenl. 255; Horbach *v.* Huey, 4 Watts, 455; Beach *v.* Hotchkiss, 2 Conn. 697. In Austin *v.* Walsh, 2 Mass. 401, A. & B. jointly consigned a cargo, directing the master to keep the proceeds till called on. Before the vessel returned, A. & B. agreed to divide, and the master subsequently paid A. his share. B. demanded his of the master, who refused, but offered to "pay the true owner." It was *held* that this would be construed as a direct promise to pay B., and that he might sue accordingly. So also Burn *v.* Morris, 3 Caines, 54.

(*w*) Pease *v.* Hirst, 10 B. & C. 122; Dobbin *v.* Foster, 1 Car. & K. 323. In Atkinson *v.* Laing, 1 Dowl. & R. N. P. 16, a contrary doctrine was held by Lord Tenterden; but see this case examined, *supra*, p. * 330, n. (*q*).

(*x*) Pease *v.* Hirst, 10 B. & C. 122; Wilsford *v.* Wood, 1 Esp. 182; where an incoming partner, whose entry had been antedated on the partnership deed, was not allowed to join in an action on a contract made prior to his entry, but subsequent to the date of the deed.

ners. (*y*) Intimately connected with this topic is the question, how far a guaranty, bond of indemnity, and the like, is construed as covering matters subsequent to a change of the firm by the retirement or accession of a partner or partners; and when it ceases to have any operation after such change. We give the authorities on this subject in the note. (*z*) It will be seen that

(*y*) Pease *v.* Hirst, 10 B. & C. 122. In this case, a note was made to A., B., C., D., & E., partners in a banking-house, as security for advances to be made by them. A. and B. left the firm, and new members entered it; and advances were also made by the new firm. The note was handed by the old firm to the new, but not indorsed. An action thereon by the old firm for the new advances was *held* rightly brought by them, and by them only; the security covering the new advances being evidently intended to be a continuing one.

(*z*) The earliest case is that of Wright *v.* Russell, 3 Wils. 532. Here a bond, conditioned for the faithful service of W. Baird as clerk, was made to the plaintiff, Wright. Wright subsequently took a partner. Baird then left his service, but re-entered that of the new firm; and, while in their service, committed a breach of trust by embezzling the money of the firm. In an action of debt on the bond, judgment was given for the defendant; De Grey, C. J., saying: "The law is, that a surety shall not be bound beyond the terms of his engagement, as understood at the time he entered into it. Here Wright, by his own act, takes in a partner. From that moment the suretyship is at an end. If there is one, there may be twenty partners taken in. Is the surety liable if Baird disobeys the orders of any one of these partners? Or can the surety be called upon to insure the money of all of the partners? Certainly not." In Barclay *v.* Lucas, 1 T. R. 291, however, Lord Mansfield *held*, that bonds of this nature were given to the house, and not to the individual; and that, therefore, they extended the application of the bond to a new firm, if the old name was preserved. In this case, considerable reliance was placed on the recital by which the partners were to take the clerk into their employ, "in their shop and counting-house." And, in another case, it was admitted to be the common understanding among merchants, that the firm, and not the individual partners, were meant to be guaranteed from loss: per Mansfield, C. J., in Weston *v.* Barton, 4 Taunt. 673. But the case of Barclay *v.* Lucas seems clearly not law. In Barker *v.* Parker, 1 T. R. 287, where the bond guaranteed faithful service to "A. B., and his executors," Lord Mansfield *held*, that this did not cover breaches committed by the clerk while in the service of the executors of A. B., who kept on in the same business after the death of their testator. He attempted to sustain Barclay *v.* Lucas, by the distinction that the change in that case was only by the accession of a new partner, the old firm still continuing. But this distinction is expressly against the case of Wright *v.* Russell, *supra*, and must fall with the case of Barclay *v.* Lucas, which rests solely upon it, if the case of Wright *v.* Russell be law. Of this there is now little doubt. In Myers *v.* Edge, 7 T. R. 254, Lord Kenyon said: "I very much approve of the case from Wilson;" and decided the case before him on its authority. Story, Part. § 250, note 3, says: "Barclay *v.* Lucas was a case which was supposed to contain language importing a provision of this [a continuing] character; but great doubts may well be entertained whether the case can be maintained upon any such interpretation."

the general rule, as now established, *is that such *332
change discharges a bond of indemnity. And the principle is applied with equal force to simple guaranties. (*a*)
*And on the same ground any change in a firm *333
materially altering its character discharges the surety, although the members of the firm remain unchanged. (*b*) So where there is an alteration, by removal or accession, in the parties whose conduct is guaranteed, the bond is discharged of farther operation. (*c*) And a contract with an ostensible partner, which has particular reference to his individual skill, has been *held* not to survive to the dormant partner. (*d*)

From the cases cited in the notes to the last paragraph and from the nature of partnership, we should draw the general

So in Weston *v.* Barton, 4 Taunt. 673, it was said by Mansfield, C. J.: "The propriety of Barclay *v.* Lucas has been very much questioned." In this last case, the condition was for repayment to five bankers of any money advanced by these five, or any or either of them; and it was *held*, that even this did not cover advances made by the survivors after one had died, Mansfield, C. J., saying: "There may be many very good reasons for such a construction. It is very probable that sureties may be induced to enter into such a security by a confidence which they repose in the integrity, diligence, caution, and accuracy of one or two of the partners. In the nature of things, there cannot be a partnership, consisting of several persons, in which there are not some persons possessing these qualities in a greater degree than the rest; and it may be that the partner dying or going out is the very person on whom the sureties relied." The same was *held* in Arlington *v.* Merrick, 2 Saund. 412; Strange *v.* Lee, 3 East, 484.

(*a*) Myers *v.* Edge, 7 T. R. 254; Spiers *v.* Houston, 4 Bligh, N. S. 515; *Ex parte* Kensington, 2 Ves. & B. 79; Holland *v.* Teed, 7 Hare, 50. So in *Ex parte* McGee, 9 Ves. 697, an agreement to pay bills into a banking-house was *held* discharged by the bankruptcy of the partners, and an action was *held*, to lie against the assignees in bankruptcy for bills paid subsequently to that event. In the case of Dry *v.* Davy, 10 Adol. & E. 30, it was even *held*, that the retirement of a dormant partner put an end to a guaranty. If the dormant partner was not known to the guarantor, she could only claim that the guaranty was at an end because she had contracted with the partners in interest, and not in name merely. This position, however, does not bring the case within the reason of personal confidence reposed actually, or by legal intendment, in the known members of the firm, as assigned by Lord Mansfield in Weston *v.* Barton, *supra*, and followed in Arlington *v.* Merrick, and Strange *v.* Lee, *supra;* and the authority of this case, therefore, finds no support in those.

(*b*) Thus, in Dance *v.* Girdler, 1 Bos. & P. N. S. 34, the incorporation of the obligees had this effect.

(*c*) Simson *v.* Cook, 1 Bing. 452; Univ. of Cambridge *v.* Baldwin, 5 M. & W. 580; Bellairs *v.* Elsworth, 3 Camp. 53; Russell *v.* Perkins, 1 Mass. 368; London Ass. Co. *v.* Bold, 6 Q. B. 514.

(*d*) Robson *v.* Drummond, 2 B. & Ad. 303. And see Stevens *v.* Benning, 1 Kay & J. 168, 6 De Gex, M. & G. 223.

conclusion, that a bargain with a firm expires with the dissolution of the firm, or with any change in it, and is not assignable or transferable by the firm to one of the partners, or to a stranger. For this the obvious reason may be given, that any contract with a firm may be supposed to be made with the persons composing it; because they are partners. It may be impossible to say that the bargain was made on the credit, pecuniary or moral, of this one or that one. The party has a right to say that he made it with all, because they were all there, and each contributed what he did, whether of money, skill, or character.

Only those who are named as parties in contracts under seal can sue upon such contracts. (*e*) But it has been *held*, that where a deed was made to a partnership by the name of the firm, the then existing partners might sue upon it, and parol evidence was admitted to show who those were. (*f*) And in another case a bond to the trustees of a trading company, to secure the faithful services of a clerk, was held to remain in full force so long as the clerk acted in that capacity, notwithstanding the fluctuations of the company. (*ff*) Where the partners have substituted a deed for a simple contract, the latter is merged in the former, and those only who are parties to the deed can sue upon it. (*g*)

The same limitation of the parties to the action to those whose names appear on the instrument prevails in the case of negotiable paper, and all those parties must sue. (*h*) If

(*e*) Cabell *v.* Vaughan, 1 Saund. 291, *f*; Metcalfe *v.* Rycroft, 6 Maule & S. 75; Vernon *v.* Jefferys, 2 Str. 1146; Lefevre *v.* Boyle, 3 B. & Ad. 877; Ehle *v.* Purdy, 6 Wend. 629; Petrie *v.* Bury, 3 B. & C. 354; *Ex parte* Williams, Buck, 13, 15, note; Scott *v.* Godwin, 1 B. & P. 74. Thus it is said, in Montague *v.* Smith, 13 Mass. 405: "When covenants are made by or between two or more parties, although the covenant be for the benefit of a third person, mentioned in the instrument, the action must, nevertheless, be brought by the parties."

(*f*) Moller *v.* Lambert, 2 Camp. 548; 1 Lindley on Part. 386.

(*ff*) Metcalf *v.* Bruin, 12 East, 400; 2 Camp. 422.

(*g*) Evans *v.* Bennett, 1 Camp. 303, note. "There has been no case where, the interest being the same as that secured by deed, it has been holden that assumpsit would lie," Lord Ellenborough, Schack *v.* Autorg, 1 Maule & S. 574; but the interest intended to be secured by the two must be identical. See Twopenny *v.* Young, 3 B. & C. 208, and Dean *v.* Newhall, 8 T. R. 168; Solly *v.* Forbes, 2 Brod. & Bing. 38.

(*h*) In actions on bills and notes, only the parties thereto can, but all these must, sue. Guidon *v.* Robson,

the note be indorsed * in blank, then, of course, all or * 334
any of the partners may sue thereon. (*i*)

If a simple contract be made with one partner for the benefit of the firm, it may be sued by all, (*j*) and cannot be sued excepting by all the partners, unless there be some express language or circumstances which make it a bargain with one only; (*k*) whereas such contracts, in cases where the parties to be benefited and the one making the contract do not stand in the relation of partners, may generally be sued either by the party whose name is used, (*l*) or by the parties actually interested, though their names be not used. (*m*) But this

2 Camp. 302; Bawden *v.* Howell, 3 Man. & G. 638; Pease *v.* Hirst, 10 B. & C. 122; Siffkin *v.* Walker, 2 Camp. 307; Whitney *v.* McKechnie, 1 Bosw. 427. In Boswell *v.* Dunning, 5 Harring. 231, because the note was indorsed in full to a firm, by the firm name, proof was required of the partnership.

(*i*) Ord *v.* Portal, 3 Camp. 239; Attwood *v.* Rattenbury, 6 J. B. Moore, 579; Machell *v.* Kinnear, 1 Stark. 499. But if it appear affirmatively, by the defendant, that the note was delivered to third persons, in the first place the plaintiffs must show a delivery to themselves by such holders. Id.

(*j*) Garrett *v.* Handley, 4 B. & C. 664; Alexander *v.* Barker, 2 Cromp. & J. 133; Skinner *v.* Stocks, 4 B. & Ad. 437; Cook *v.* Seely, 2 Exch. 746; Halliday *v.* Daggett, 6 Pick. 359; Creel *v.* Bell, 2 J. J. Marsh. 309; Fortune *v.* Brazier, 10 Ala. 793; Stevens *v.* Lunt, 19 Me. 70; Wright *v.* Williamson, 2 Penn. 978; Pearson *v.* Parker, 3 N. H. 366. This is, indeed, the case in all implied contracts, that arise in the course of the partnership business; for, as the implied promise must follow the consideration, it is raised to the firm from whom the consideration moves. Boggs *v.* Curtin, 10 Serg. & R. 211; Lee *v.* Gibbons, 14 id. 111; Ulmer *v.* Cunningham, 2 Greenl. 118, 119; Addison on Cont. 743; 1 Pars. on Cont. (5th ed.) 26.

(*k*) Sims *v.* Bond, 5 B. & Ad. 389; Garrett *v.* Handley, 3 B. & C. 462; Oliver *v.* Burton, 17 Q. B. 989; Warner *v.* Griswold, 8 Wend. 665; Platt *v.* Halen, 23 id. 456; Ewing *v.* French, 1 Blackf. 353; Ward *v.* Leviston, 7 id. 466; Doremus *v.* Seldon, 19 Johns. 213; Burn *v.* Morris, 3 Caines, 54; Munroe *v.* Ezzel, 11 Ala. 603. Thus, in Wood *v.* O'Kelly, 8 Cush. 406, where the question whether a mesmeric doctor should join as coplaintiff, in an action for medical services, his partner, the woman who slept in the clairvoyant state, and with whom he divided the net profits after paying expenses, the court below ruled, that, if the woman was a silent partner, she need not be joined. In the court above, it was not necessary to consider the question. The court, however, said: "It is not necessary that a dormant partner should be joined with the ostensible partners of a firm, in an action against a person who dealt only with the ostensible partners."

(*l*) Ward *v.* Leviston, 7 Blackf. 466; Rodwell *v.* Ridge, 1 Car. & P. 220; Skinner *v.* Stocks, 4 B. & Ald. 437; Desher *v.* Holland, 12 Ala. 513; Warner *v.* Griswold, 2 Wend. 665; Lapham *v.* Green, 9 Vt. 407; Curtis *v.* Belknap, 21 id. 433; Sims *v.* Bond, 5 B. & Ad. 393; Colburn *v.* Phillips, 13 Gray, 64, 66; Sims *v.* Brittain, 4 B. & Ad. 375.

(*m*) Arden *v.* Tucker, 4 B. & Ad. 815; Rodwell *v.* Ridge, 1 Car. & P. 220; Lapham *v.* Green, 9 Vt. 407; Cothay *v.* Fennel, 10 B. & C. 671; Alexander *v.* Barker, 2 Cromp. & J.

* 335 differs from the case supposed in the last * paragraph, thus: A promise to a present firm, with the understanding that others may come in and profit by it, is still no bargain with those others. They are not known, and are indeed uncertain as yet. But a bargain with one of a firm for the interest and benefit of all the firm is a present bargain with all the firm. And thus the rule remains good that those, and only those, with whom the bargain is made can sue upon it. The exception where a bargain is made under seal with one for the interest and benefit of others, in which case only those named as parties can sue, arises from the peculiar law of specialties, which prevents any persons not named from coming in as parties.

But where a written but not sealed contract is entered into with one partner, it not appearing on the face of the contract that he was acting on behalf of the firm, he may sue alone, on that contract. In such a case, the action may be maintained either in the name of the person with whom alone the contract was ostensibly made, or in that of the parties who can be shown to be really interested. (*n*)

Partnership contracts for insurance are governed by the same rule, that those and only those by whom the bargain is made can sue upon it, excepting so far as the rule is modified by the law of insurance, which, under certain circumstances, permits persons by whose authority and for whose benefit a policy is made, to sue, although their names are not mentioned. (*o*) By that law, the persons named in the policy may sue, and they alone can sue, unless the policy is made "for all whom it may concern," or contains other general words

133, 138; Robson *v.* Drummond, 2 B. & Ad. 303, 307, 308, per Parke and Littledale, JJ.; Stacy *v.* Decey, 2 Esp. 169, n.; Skinner *v.* Stocks, 4 B. & Ald. 437; Garrett *v.* Handley, 4 B. & C. 664; Curtis *v.* Belknap, 21 Vt. 433; Creel *v.* Bell, 2 J. J. Marsh. 309; Pitts *v.* Mower, 18 Me. 361; Story on Agency, § 160, and cases cited; Halliday *v.* Doggett, 6 Pick. 359; Ward *v.* Leviston, 7 Blackf. 466; Edmund *v.* Caldwell, 15 Me. 340. But the party for whose benefit the contract was made must also be the one from whom the consideration moves, or he can maintain no action, Mellen *v.* Whipple, 1 Gray, 317, 321, 322; Colburn *v.* Phillips, 13 id. 64, 66; with one or two well-defined exceptions, Id.

(*n*) Curtis *v.* Belknap, 21 Vt. 433. And see Skinner *v.* Stocks, 4 B. & Ald. 437; Cothay *v.* Fennell, 10 B. & C. 671; per Littledale, J., in Robson *v.* Drummond, 2 B. & Ad. 303; Phillips *v.* Pennywit, 1 Pike (Ark.), 59.

(*o*) Grove *v.* Dubois, 1 T. R. 112; Cumming *v.* Forrester, 1 Maule & S. 497; Hagedorn *v.* Oliverson, 2 id. 426; 2 Pars. on Maritime Law, 29, and note 3.

of equivalent import. (*p*) The * reason of this is, that * 336
the insurers are entitled to know whom they insure, or else to know that they insure unknown persons, that they may make their terms accordingly. (*q*) An insurance by one partner in his own name and without general words, although on property belonging to the firm, covers only his interest, and the firm cannot maintain an action on such a policy. (*r*) Whether the partner insured, in an action for the whole loss, averring in his declaration an entire interest, can upon proof of the firm ownership recover any thing, and, if any thing, whether his *pro rata* share only, or the whole, has been variously decided. Some of the cases, including a decision of the United States Supreme Court, given by Marshall, C. J., which is entitled to the highest respect, holding that he cannot recover at all; (*s*) others, that he may to the extent of his interest as a partner; (*t*) and others still, that he may recover the whole loss. (*u*)

(*p*) Finney *v.* Bedford Com. Ins. Co., 8 Metc. 348; Turner *v.* Burrows, 5 Wend. 541; Jefferson Ins. Co. *v.* Cotheal, 7 id. 72; Finney *v.* Warren Ins. Co., 1 Metc. 16; 1 Phillips on Ins. §§ 391, 392; 2 Duer on Ins. § 20; Graves *v.* Boston M. Ins. Co., 2 Cranch, 419.

(*q*) Dumas *v.* Jones, 4 Mass. 647.

(*r*) Graves *v.* Boston M. Ins. Co., 2 Cranch, 419; Pearson *v.* Lord, 6 Mass. 81; Turner *v.* Burrows, 5 Wend. 541. See also Bell *v.* Ansley, 16 East, 141; Hibbert *v.* Martin, 1 Camp. 538; Cohen *v.* Hannam, 5 Taunt. 101; Lawrence *v.* Sebor, 2 Caines, 203.

(*s*) In Graves *v.* Boston M. Ins. Co., 2 Cranch, 419, it was *held*, that a partner insuring for an individual and entire interest can recover nothing, but must suffer a nonsuit, on its appearing that he was only jointly interested in the property; the loss being a joint one, which he could neither insure nor recover for separately, either in whole or *pro rata*. The same doctrine is held in Cohen *v.* Hannam, 5 Taunt. 101, denying the authority of Page *v.* Fry, 2 B. & P. 240.

(*t*) Dumas *v.* Jones, 4 Mass. 647; Turner *v.* Burrows, 5 Wend. 541; Page *v.* Fry, 2 Bos. & P. 240; Irving *v.* Excelsior Fire Ins. Co., 1 Bosw. 507; Murray *v.* Col. Ins. Co., 11 Johns. 302, 311.

(*u*) In Horn *v.* Clarkson, 1 Caines, 276, and Lawrence *v.* Sebor, 2 id. 203, the courts admit a recovery in such case for the entire value insured. [Where one partner sells and transfers his interest to his copartner, and retires from the firm, an action cannot be maintained by the joint insurers in case of loss. Dix *v.* Mercantile Ins. Co., 22 Ill. 272; Murdock *v.* Chenango Co. Mut. Ins. Co., 2 Comst. (N. Y.) 210. On the contrary, it has been held that in such cases the action must be joint, and that, if the transfer is consented to by the insurers, the remaining partners suing in the name of the firm may recover the whole loss; if without their consent, the amount of their interest. Hobbs *v.* Memphis Ins. Co., 1 Sneed (Tenn.), 444. And where a surviving partner, by the articles, becomes sole owner, he may recover in his own name for the whole loss, though the insurers were ignorant of the agreement. Wood *v.* Rutland, &c.

There is no doubt that a contract made with a firm, and therefore with all the members of a firm, may be exchanged for any other by the act or consent of all the parties. Thus, a sale is made to a firm, who owe for it. But the merchandise is transferred by the firm to one partner, who agrees to pay for it. By this alone the obligation of all the partners is not in the slightest degree affected. But if the seller, upon being applied to, consents to the arrangement, and agrees to discharge the firm and take this partner alone as his debtor, we should think the arrangement would be valid in law,
*337 although some doubt might arise from the * fact that, as this partner was already bound with all the rest, his new promise is no consideration for the discharge of the rest. By the principle of novation, if the new debtor is altogether a new person, his promise is sufficient consideration; and, as the separate promise of a partner would bind his separate property to this debt (we shall presently consider the question whether partnership debtors can claim any of the private property of partners until their private debts are discharged), we should incline to believe that this would be consideration enough. (*w*)

Where no objection of this kind comes in, it is certain that such a transfer would be effectual; (*x*) as if a sale were made by a firm and the debts transferred to one partner, and the debtor, being discharged by the other partners, agreed to pay that one; (*y*) or if a guaranty were made to a firm, and transferred to one partner; or made to one partner, and by him transferred to a firm; and the guarantor, for any sufficient consideration, agreed to the transfer.

Ins. Co., 31 Vt. 552. On the other hand, where a sole trader takes a partner, with the consent of the insurers, and that the policy shall be good to the firm, it has been held that no action can be maintained by either partner severally, or by both jointly, but the remedy must be in equity. Bodle *v.* Chenango Co. Mut. Ins. Co., 2 Comst. (N. Y.) 53.]

(*w*) See *ante*, p. *329, note (*p*); p. *331, note (*y*).

(*x*) See *ante*, p. *329, note (*p*).

(*y*) Cook *v.* Beech, 10 Humph. 412; Degroot *v.* Darby, 7 Rich. 117; Howell *v.* Reynolds, 12 Ala. 128.

SECTION II.

OF THE REMEDIES OF PARTNERS AGAINST THIRD PARTIES, FOR TORTS.

It is plain that there may be torts against a firm jointly, as well as against any or all the partners. And there is no reason why the firm may not as such sue the wrong-doer at law. (*z*) But the * rule would doubtless be strictly applied, * 338 that damages could be recovered only for the joint injury sustained. (*a*) Thus an action would lie for seducing away one in their employ, (*b*) for turning any business from them by fraud and falsehood, or for any fraud against the whole firm, or for slander of them as merchants, (*c*) or for

(*z*) Addison *v.* Overend, 6 T. R. 766; Cabell *v.* Vaughan, 1 Wms. Saund. 291, m. and notes; Glover *v.* Austin, 6 Pick. 209; Bloxam *v.* Hubbard, 5 East, 407; Cooke *v.* Bachellor, 3 Bos. & P. 150; Foster *v.* Lawson, 3 Bing. 452; Taylor *v.* Church, 4 Seld. 452, 1 E. D. Smith, 479; Sewall *v.* Catlin, 3 Wend. 291; Patten *v.* Gurney, 17 Mass. 186, followed in Medbury *v.* Watson, 6 Metc. 246, 257, 258. A dormant partner may join in trover. Robinson *v.* Mansfield, 13 Pick. 139. The rule is often laid down that partners *may* join in an action *ex delicto* for an injury affecting their joint interest. Best, J., in Foster *v.* Lawson, 3 Bing. 455. It is more correct to say that they *must*. Patten *v.* Gurney, 17 Mass. 185; cases cited *supra;* Ward *v.* Brampston, 3 Lev. 362. If they do not join, it can, however, only be taken advantage of by plea in abatement. Deal *v.* Bogue, 20 Penn. St. 228; Gibson *v.* Stevens, 7 N. H. 352, 358; 1 Chitty Pl. 65; Gow on Part. 136; Pickering *v.* Pickering, 11 N. H. 141; Nightingale *v.* Scammell, 6 Cal. 506; Anonymous, W. Jones, 253. Or the court may abate the writ *ex officio.* Hart *v.* Fitzgerald, 2 Mass. 509.

(*a*) Barratt *v.* Collins, 10 J. B. Moore, 446; Haythorn *v.* Lawson, 3 Car. & P. 196; Pechell *v.* Watson, 8 M. & W. 691. Thus in Garland *v.* Noble, 1 J. B. Moore, 187, it was *held,* that on a submission to arbitration of all matters in dispute between a partnership and an individual, only the joint claims of the firm were in issue. The same was the case in Barratt *v.* Collins, *supra.* See the cases in note (*h*), *infra.*

(*b*) Story on Part. § 258.

(*c*) Lewis *v.* Chapman, 19 Barb. 252, where a postscript to a letter saying "*confidential;* had to hold over a few days for the accommodation of L. & H.," was *held* libellous if false, when addressed to the creditors of L. & H.; but *held* in the Court of Appeals to be for the jury to determine as a question of interest, 16 N. Y. 369; Foster *v.* Lawson, 3 Bing. 452; Cooke *v.* Bachellor, 3 Bos. & P. 150; Sewall *v.* Catlin, 3 Wend. 291; Haythorn *v.* Lawson, 3 Car. & P. 196; Bumage *v.* Prosser, 4 B. & C. 247; Williams *v.* Beaumont, 10 Bing. 270; Taylor *v.* Church, 1 E. D. Smith, 279, 4 Seld. 452; Le Fanu *v.* Malcomson, 1 H. L. Cas. 637. In this last case, a charge of cruelty to employés was *held* an injury to the firm in their trade, for which they could sue jointly. See also Davis *v.* Davis, 1 Nott & McC. 290; Backus *v.* Richardson, 5 Johns. 483, 485; Ware *v.* Clowny, 24 Ala. 707; Babonneau *v.* Farrell, 15 C. B. 360, 28 Eng. L. & Eq. 339.

conversion of the property of the firm ; (*d*) or, indeed, for any injury wrongfully inflicted, whether by negligence or with wrongful intent. (*e*) So, too, if an injury affected two or more members of a firm jointly, and not the rest, those who were jointly injured could sue jointly. (*f*)

* 399 * It might not always be easy to draw the line between damages, which were recoverable in such an action, because they were joint, and those which were not recoverable, because they were not joint. (*g*) Thus, if a libel charged insolvency or dishonesty upon any one partner, he, of course, could sue ; but, in strict law, he could not recover in this several suit for any damage done to the firm of which he was a member, and not even, we should say, for his share of this damage. For this the firm must sue, and, in this suit, they could recover only for the damage all sustained jointly. (*h*)

(*d*) In trover or trespass for injuries to the joint property, the partners can (and must) join. Wilson *v.* Comine, 2 Johns. 280; Patten *v.* Gurney, 17 Mass. 185, 187, per Parker, C. J.; Glover *v.* Austin, 6 Pick. 209.

(*e*) Weller *v.* Baker, 2 Wils. 414, 423; Patten *v.* Gurney, 17 Mass. 185; Medbury *v.* Watson, 6 Metc. 257, 258. Thus case lies by a firm against an officer if he improperly give up property attached at their suit. Commercial Bank *v.* Wilkins, 9 Greenl. 28.

(*f*) This question seems most generally to have arisen where the joint property has been seized, or sold and delivered, on execution against one partner, for his separate debt. In fact, it would seldom arise in any other way, except perhaps in the case of collusion, between one partner and some third party, to slander or defraud the firm; since the injury, to admit of a joint action as partners by two or more members of the firm to the exclusion of another member, must touch them in their partnership property, or interest in that property, and yet not affect the excluded partner, by reason of the act by which the injury is caused being justifiable as to him, or one for which he is responsible. In many of the States, it is *held*, that the sheriff may seize, and deliver to the purchaser, the specific property of the firm, and that the purchaser thereby becomes tenant in common with the other partners of that property: as in Maine, New York, Alabama, Iowa, Illinois, North Carolina, Texas, Michigan, Ohio, New Jersey. So in England; but see next chapter. In case, therefore, the purchaser should undertake to convert the property by a destruction of it, or, as is *held* in some courts, by a sale, trover would lie against him, as against any tenant in common, by the other partners excluding the debtor partner. Wilson *v.* Reed, 3 Johns. 175; Mayhew *v.* Herrick, 7 C. B. 229, per Maule and Cresswell, JJ.; White *v.* Osborne, 21 Wend. 72; Hyde *v.* Stone, 7 id. 354.

(*g*) In trover by one partner against a sheriff who has sold the whole property on a levy, for the separate debt of the copartner, in the absence of precise proof of his interest the partner may recover a moiety, Walsh *v.* Adams, 3 Denio, 125; Deal *v.* Bogue, 20 Penn. St. 228; or the proportion of his original interest in the goods, if this appear, Deal *v.* Bogue, id.

(*h*) One partner can recover for a libel on him in the way of his trade, although the libel also affects the firm. Harrison *v.* Bevington, 8 Car. & P.

Possibly the principle of exemplary damages, which, although called in question by high authority, is, we think, certainly admissible in some actions for tort, and, possibly in all, might come in aid of the plaintiff, and help to remove the difficulty. (*i*) If a third person colluded with a partner to defraud * the firm, there would be very great difficulty * 340 in permitting the whole firm, including the fraudulent partner, to sue this third person; and, also, some difficulty in maintaining a suit by the other partners for the damage done to the firm. (*j*) This latter action, however, has been sustained, and we have no authority for supposing the former maintainable. But what damages could be recovered in such an action, whether all that the firm sustained, or only the proportion of the suing partners, we are not informed. (*k*)

708; Robinson *v.* Marchant, 7 Q. B. 918; and even though the firm has already recovered for its injury through the same libel. Taylor *v.* Church, 1 E. D. Smith, 279. See Le Fanu *v.* Malcomson, 1 H. L. Cas. 637, where the libel referred to occurrences "in some of the Irish factories," and the plaintiff was allowed by innuendo to show that this was applied to himself, though his name did not appear therein. The question of damages being one for the jury, it was intimated by Coleridge, J., that where on the face of the declaration the damage is partly joint, and partly several, the course in such a case would be to limit the proof at the trial. Robinson *v.* Marchant, 7 Q. B. 923; Taylor *v.* Church, 1 E. D. Smith, 279, affirmed on error, 4 Seld. 452; Foster *v.* Lawson, 3 Bing. 452. Perhaps the doctrine on this subject may be briefly stated thus: An action on such libel, either by the firm, or the single partner, or by both, will lie; both may declare without proof of special damage, and the jury will be presumed to have confined themselves to the injury of the party plaintiff. If they allege special damage, the proof will be limited at the trial. If the libel be such that the respective injury cannot be distinguished, the defect must be specially demurred to. Injuries, however, to the personal feelings, cannot of course be included in a joint suit by the firm. Haythorne *v.* Lawson, 3 Car. & P. 196.

(*i*) Taylor *v.* Church, 1 E. D. Smith, 279, 4 Seld. 452, and cases cited; and see Lewis *v.* Chapman, 19 Barb. 252. Also, see Symonds *v.* Carter, 32 N. H. 458; Cramer *v.* Noonan, 4 Wis. 231; Fry *v.* Bennett, 4 Duer, 247.

(*j*) Longman *v.* Pole, Moody & M. 223. In the Metropolitan Saloon Omnibus Co. *v.* Hawkins, 4 Hurlst. & N. 87, 92, Longman *v.* Pole was cited and affirmed; and it was even said by Watson, B.: "But it is clear that an ordinary partnership would have a right to maintain an action against one of its members, for injury to their real or personal property, and for all wrongs done to them."

(*k*) By the analogy of cases in trover against sheriffs for sales of the entire property of the firm, it would seem that the extent of the recovery might be for the shares of the innocent partners. But as the defendant is guilty of acquisition of the property by a fraud, though against the plaintiffs only, this would perhaps estop him from claiming any property thereunder; for the law would not permit him to divide his own fraud.

We should have said, that an action by all the partners, including the fraudulent partner, and using his name only for the benefit of the innocent partners, and recovering, therefore, only the share of damage sustained by the innocent partners, (*l*) might have satisfied the justice of the case, and the technical rules of law, quite as well.

We know nothing in the law of partnership which limits the power of equity in giving the partnership relief against third parties. We mean, that in all cases of this kind, the same reasons for giving relief would be required, and the same selection of remedy, whether by injunction, discovery, specific performance, or otherwise, as in similar cases which did not concern partnership. (*m*) There is, however, one question which has arisen, where a partnership has prayed for an injunction, to prevent a several creditor of a partner from interfering with the partnership property, which comes up as a question of the remedies of partnerships against third persons. It is, in fact, however, a question as to the rights and remedies of third persons against the partnership; and this general subject we will not proceed to consider, * adding only to this section, that where the partnership is itself illegal, or where the action or the object of the action is illegal, no suit can be maintained by a partnership, any more than it could be by an individual, under the same circumstances. (*n*) It has, however, been held that, when one partner seeks in equity a settlement of the partnership, the fact that the firm was established for a fraudulent purpose is no defence. (*nn*) But this is not certain.

* 341

(*l*) See the preceding note.

(*m*) Hood *v.* Aston, 1 Russ. 416; Jervis *v.* White, 7 Ves. 413; Motley *v.* Dounman, 3 Mylne & Cr. 1; Knott *v.* Morgan, 2 Keen, 213; Small *v.* Atwood, Younge, 456; Fenn *v.* Craig, 3 Younge & C. 216; Clay *v.* Rufford, 8 Hare, 281; Douglas *v.* Horsfall, 2 Sim. & S. 184.

(*n*) Biggs *v.* Lawrence, 3 T. R. 454, where the partnership was formed for smuggling.

(*nn*) Harvey *v.* Varney (2 Browne), 98 Mass. 118; [but see Sampson *v.* Shaw, 101 Mass. 145.]

CHAPTER X.

OF THE REMEDIES OF THIRD PERSONS AGAINST THE PARTNERSHIP AND AGAINST PARTNERS.

SECTION I.

OF THE APPROPRIATION OF THE PROPERTY TO THE DEBTS.

The remedies of third parties against the firm and its members are generally the same as those which exist in relation to individuals. Similar actions at law, and similar suits in equity, with such variation as the nature of the case suggests and requires; similar attachment, whether direct or foreign attachment, or garnishee process, and similar levy and execution; but always subject to one modification or exception, which has caused much conflict and uncertainty in practice, and of which all the effects and all the rules are not yet determined. This exception arises from the fact that there may be creditors of the partnership, and creditors of the several partners; and the rights and claims of these two classes of creditors are conflicting.

In the days of Salkeld and Lord Raymond, one hundred and fifty years ago, the extreme inadequacy and incompleteness of the law of partnership are proved by the fact, that a creditor of a partner got at once by execution the share of the indebted partner in the partnership property. If there were two partners, — and at that time it would seem that there were seldom more, — a creditor of one got judgment and execution against him, and levied it upon the partnership property, of which the sheriff (although he seized the whole) sold one-half. If there were three, he sold one-third; if four, one-quarter. (*a*) The

(*a*) Heyden *v.* Heyden, 1 Salk. 392; Mariott *v.* Shaw, Comyn, 277; Bac-Jacky *v.* Butler, 2 Ld. Raym. 871; hurst *v.* Clinkard, 1 Show. 169.

progress of the change is not very distinctly exhibited
*343 * in the reports; but it began early, (*b*) and it has long since been the well-established rule and practice, that no private creditor of a partner could take, by his execution, any thing more than that partner's share in whatever surplus remained after the partnership effects had paid the partnership debts. (*c*)

There are two entirely distinct, and indeed opposite, ways of viewing a commercial partnership. One of them regards it as a modified tenancy in common; the other regards it as a modified corporation. It is certain that a partnership is neither a tenancy in common nor a corporation; and it is equally certain that it has some of the attributes and qualities of each of these forms of joint ownership. The question, which lies at the bottom of the difficulties presented by our present topic, seems to us to be this: Which of these two things does partnership most nearly approach?

Exactly so far as a partnership is a tenancy in common, it has no existence as a body by itself, and has no property, and no debts or creditors. Just so far as it is a corporation, it has

(*b*) It seems to have been received in the time of Lord Mansfield. In Fox *v.* Hanbury, Cowp. 445, the sale by the sheriff was limited to the share of the partner after the settlement of all the partnership accounts; to ascertain which, an account was taken on a reference before a Master in Chancery. But in Parker *v.* Pister, 3 Bos. & P. 288; Chapman *v.* Koops, id. 289, this equitable process by a court of law was emphatically refused by Lord Alvanly. See the history of the change, examined in *Ex parte* Smith, 16 Johns. 102, note; 3 Kent Comm. 65, note (*a*); Am. Jur., Oct. 1841, art. 3.

(*c*) Washburn *v.* Bank of Bellows Falls, 21 Vt. 278, 284; Matlock *v.* Matlock, 5 Ind. 403; Andrews *v.* Keith, 34 Ala. 722; Rodriguez *v.* Heffernan, 5 Johns. Ch. 417; Murray *v.* Murray, id. 60; Delmonico *v.* Guillaume, 2 Sandf. Ch. 366; Smith *v.* Jackson, 2 Edw. Ch. 28; U. S. *v.* Hack, 8 Pet. 275; Moody *v.* Payne, 2 Johns. Ch. 548; *Ex parte* Smith, 16 Johns. 102; Walsh *v.* Adams, 3 Denio, 125; Lyndon *v.* Gorham, 1 Gallison, 367; Tappan *v.* Blaisdell, 5 N. H. 193, per Richardson, C. J.; Gibson *v.* Stevens, 7 N. H. 352; Morrison *v.* Blodgett, 8 N. H. 244, 254; Newman *v.* Bean, 1 Fost. 93; Hill *v.* Wiggin, 11 id. 292; Church *v.* Knox, 2 Conn. 523; Witter *v.* Richards, 10 id. 41; Tilley *v.* Phelps, 18 id. 294; Rice *v.* Austin, 17 Mass. 206; Brewster *v.* Hammitt, 4 Conn. 540; Smith *v.* Barker, 1 Fairf. 458; Commercial Bank *v.* Wilkins, 9 Greenl. 38; Douglas *v.* Winslow, 20 Me. 89; Doner *v.* Stauffer, 1 Barr, 198; Deal *v.* Bogue, 20 Penn. St. 228; Greene *v.* Greene, 1 Ohio, 244; Place *v.* Sweetzer, 16 Ohio, 142; Sutcliffe *v.* Dohrman, 18 id. 181; Winsten *v.* Ewing, 1 Ala. 29; Lucas *v.* Laws, 27 Penn. St. 211; Hubbard *v.* Curtis, 8 Iowa, 1, 14; Ridgway *v.* Clare, 19 Beav. 11; [Ross *v.* Henderson, Sup. Ct. N. C., 4 L. & Eq. Reptr. 211.]

an independent existence, and its own property, and its own debts. And precisely, as in recent times, it has been found necessary, in this * country, where so much busi- * 344
ness is done by corporations, to impart to corporations many of the qualities of partnership; and just as during the difficult and tedious process of adjusting this new condition of joint ownership and joint action, many mistakes were made and much mischief done, until the just medium was found, and the reconciling principle which best protects the interests of all concerned; so, in reference to partnership, we apprehend that mischief has been caused by the difficulty of adjusting its true relation to a corporation, or, in other words, in determining the degree in which the law will acknowledge a voluntary mercantile partnership as a *quasi* independent body, and the consequences which it will derive from this acknowledgment.

We have no doubt whatever that the rule now, as has been said, perfectly established, which shuts out the creditors of the several partners from the partnership property, until that has paid the partnership debts, is derived directly from this acknowledgment; and it would seem to be an inevitable consequence of any recognition of a partnership as a body by itself, having its own creditors and its own effects; and we are also confident that most of the difficulties which still embarrass this subject will be removed by a more distinct recognition, and more direct application, of the same principle.

Not many years since, there began, — perhaps not with Lord Eldon, but confirmed by him, (*d*) — a way of explaining

(*d*) Lord Hardwicke *held*, that a partner, or his representatives, had a specific lien upon the partnership stock for his surplus. West *v.* Skip, 1 Ves. Sen. 239. See Dodington *v.* Hallett, 1 Ves. Sen. 498, 499; by Lord Eldon, in *Ex parte* Younge, 2 Ves. & B. 242, because the parties were part-owners and not partners. The theory, as upheld by later authorities, is undoubtedly founded on the remarks of Lord Eldon, in *Ex parte* Ruffin, 6 Ves. 119, followed by *Ex parte* Williams, 11 Ves. 4. In the latter case, he said: "I have frequently, since I decided the case of *Ex parte* Ruffin, considered it, and I approve of that decision." "The grounds on which I went in *Ex parte* Ruffin were these: Among partners clear equities subsist, amounting to something like a lien. The property is joint; the debts and credits are jointly due. They have equities to discharge each of them from liability, and then to divide the surplus according to their proportions; or, if there is a deficiency, to call upon each other to make up that deficiency according to their proportions. But while they remain solvent, and the partnership is going on, the creditor has no equity against the effects of the partner-

* 345 the rights * and determining the remedies of partners, by supposing a kind of lien on the partnership property, by the partners, and a kind of lien by the creditors on the partners' lien. This is not the language used; but, it is said, that partners have a lien on the property for the payment of the debts, and that creditors have a *quasi* lien, and by means of this, and through the lien of the partners, they worked out their effectual remedy against the property. (*e*)

This theory is certainly obscure, and hardly capable of being definitely stated; nor does it appear to lead in any direct or distinct way to the result, for the sake of which it seems to have been constructed. There is no doubt that creditors of the firm have an equitable preference, or right, which courts of equity enforce. (*f*) But we do not see that much is gained by regarding this as a lien. (*ff*)

ship." "But still, in either of these cases [dissolution by efflux of time, the death of one partner, the bankruptcy of one, or by dry, naked agreement], the community of interest remains that is necessary, until the affairs are wound up; and that requires that what was partnership property before shall continue, for the purposes of a distribution, — not as the rights of the creditors, but as the rights of the partners themselves, require. And it is through the operation of administering the equities, as between the partners themselves, that the creditors have that opportunity; as, in the case of death, it is the equity of the deceased partner that enables the creditors to bring forward the distribution." Also, *Ex parte* Rowlandson, 2 Ves. & B. 173; *Ex parte* Fell, 10 Ves. 348. See Conwell *v.* Sandidge, 8 Dana, 278, 279.

(*e*) Story on Part. §§ 360, 361.

(*f*) *Ex parte* Williams, 11 Ves. 6; *Ex parte* Ruffin, 6 Ves. 126, 127; *Ex parte* Kendall, 17 Ves. 526; Hoxie *v.* Carr, 1 Sumner, 181–2; *Ex parte* Rowlandson, 2 Ves. & B. 172; Appeal of York Co. Bank, 32 Penn. St. 446; Baker's Appeal, 21 id. 76; Doner *v.* Stauffer, 1 Barr, 198; Wilson *v.* Loper, 13 B. Mon. 414; Jones *v.* Lusk, 2 Metc. (Ky.) 356; Stout *v.* Fortune, 7 Iowa, 183; Campbell *v.* Mullett, 2 Swanst. 575; Cross on Lien, 198; Washburn *v.* Bank of Bellows Falls, 19 Vt. 278. Authorities upon the point might be multiplied almost indefinitely. This is the recognized and decided law of all the New England States. Most of the other States have also recognized it; and no one has expressly denied its existence or obligation, so far as we know, with the exception of Pennsylvania and Georgia. See Witter *v.* Richards, 10 Conn. 37; Egberts *v.* Wood, 3 Paige, 517; McCulloch *v.* Dashiell, 1 Harris & G. 96; Hall *v.* Hall, 2 McCord Ch. 302; Wooddrop *v.* Wards, 3 Desaus. 203; Smith *v.* Johnson, 2 Edw. 28; Commercial Bank *v.* Wilkins, 9 Greenl. 28. Further see Pearson *v.* Keedy, 6 B. Mon. 128; Black *v.* Bush, 7 id. 210; Ladd *v.* Griswold, 4 Gilman, 25; Reese *v.* Bradford, 13 Ala. 837; Matlock *v.* Matlock, 5 Ind. 403; Miller *v.* Estill, 5 Ohio St. 508; Allen *v.* Centre Vale Co., 21 Conn. 130; [Williams *v.* Gage, 49 Miss. 777; Gordon *v.* Kennedy, 36 Iowa, 167.] In Pennsylvania, it was denied in Bell *v.* Newman, 5 Serg. & R. 78; *In re* Sperry, 1 Ashm. 347; and, in Georgia, in *Ex parte* Stebbins, R.

(*ff*) See Mayer *v.* Clark, 40 Ala. 259.

It seems to be admitted by Mr. Justice Story, who build upon this theory almost all the remedy of the creditors, that partners have no lien, unless in case of insolvency or dissolution; or, * certainly, that the creditors do not get * 346 their *quasi* lien, unless in these cases. It is not easy to see how either insolvency or dissolution *creates* any lien, although, in these new circumstances, new rights arise, or, at least, are developed, and come into prominence, and the courts of equity recognize and enforce them. And this we suppose to be what is meant. (*g*)

We apprehend that there is a simpler view of this subject, which is at least equally efficient, and is open to no important

M. Charlt. 77 (though this case was decided under a statute, and was exceptional in its circumstances); and questioned in Cleghorn *v.* Ins. Bank of Columbus, 9 Ga. 319. But it is now otherwise in both States. The right has been recognized in Pennsylvania, in Appeal of York Co. Bank, 32 Penn. St. 446, and other cases cited; and, in Georgia, in Hoskins *v.* Johnson, 24 Ga. 625, 630, where it is called an equity. In the case of Burtus *v.* Tisdall, 4 Barb. 588, Strong, J., says: "It is clearly settled that the joint creditors have, then, the first *equitable claim* upon the whole, for the satisfaction of their debts." Sometimes the copartnership property is called a *trust fund* for the benefit of creditors; and sometimes it has been said that the copartnership creditors have a lien, or *quasi* lien, upon it. But, whatever may be the exact nature and extent of these rights, it is certain that the joint debts have a claim of priority of payment out of the whole of the joint funds.

(*g*) If the private creditor levies on the joint property, and, on an account being taken to find the amount covered by the levy — viz., the debtor's share — if it appear that there is enough to satisfy both the joint and separate creditors, the former cannot be said to be preferred. If there is not enough to satisfy both, then there is an insolvency, and the joint creditors are preferred. So, in the case of marshalling of assets. This, therefore, seems to be the sense in which the numerous cases are to be taken which admit the equitable lien only in case of insolvency. Washburn *v.* Bank of Bellows Falls, 19 Vt. 278; Hubbard *v.* Curtis, 8 Iowa, 1; Jones *v.* Lusk, 2 Metc. (Ky.) 356; Stout *v.* Fortune, 7 Iowa, 183; Burtus *v.* Tisdall, 4 Barb. 571; Pearson *v.* Keedy, 6 B. Mon. 128; Story Eq. Jur. § 676; Griffith *v.* Buck, 13 Md. 102; Campbell *v.* Mullett, 2 Swanst. 551. As the joint creditor has no lien or equity till dissolution and insolvency, any *bonâ fide* assignment prior thereto would seem to convert the joint into separate property, and removes it from the operation of the lien. Cross on Lien, 198; *Ex parte* Ruffin, 6 Ves. 119; *Ex parte* Williams, 11 Ves. 3; Hunt *v.* Waterman, 2 R. I. 298; Smith *v.* Edwards, 7 Humph. 106; Miller *v.* Estill, 5 Ohio St. 508; Campbell *v.* Mullett, 2 Swanst. 575; *Ex parte* Fell, 10 Ves. 347; Griffith *v.* Buck, 13 Md. 102; Rogers *v.* Nichols, 20 Tex. 719; Stout *v.* Fortune, 7 Iowa, 183; Jones *v.* Lusk, 2 Metc. (Ky.) 356; Holmes *v.* Hawes, 8 Ired. Eq. 21; Wilson *v.* Soper, 13 B. Mon. 414; Reese *v.* Bradford, 13 Ala. 846; *Ex parte* Peake, 1 Madd. 358. [So where one partner sells out to another who assumes the debts. City of Maynoketa *v.* Willey, 35 Iowa, 323. See also Giddings *v.* Palmer, 107 Mass. 269.

objection. It is that which we have already intimated. A partnership is a legal body by itself; we do not say it is a corporation, because it wants some of the most essential elements of incorporation. But we say it is a body by itself, and is so recognized by the law for some purposes, and should be — always in a proper way and to a proper degree — for all purposes. And among these purposes is the placing of
* 347 its relation to its creditors on the basis of * contracting its own debts, and having its own creditors, and possessing its own property, which it applies to the payment of its debts. After this relation is exhausted, or after this work is done, there is a resolution of this body into its elements. Then come up the new relations between those who were the members of this body and those who were its creditors. If the joint debts have been so paid, in full, there are no joint creditors, and they who were partners own the remaining property, free from all encumbrance, except each other's rights, and they share this remainder between them. If the funds of the partnership were insufficient to pay its debts, they who were its members are now the debtors of those who were before only the creditors of the partnership; and, like other debtors, must pay their debts by whatever means they can. (*h*)

The law does not now make this recognition in the plain and simple way we have stated, and drawn from it all those inferences to which it would seem to lead. Thus, long after it was established that the creditors of the partnership had a priority of right to the partnership effects over private creditors of the partners, it was quite as well established that the creditors of the partnership could levy upon the private effects of the partners, just as freely as their private creditors could; thus giving to the creditors of the partnership a double change, — priority

After dissolution, if one partner purchase the interest of the other, agreeing to assume the debts, he becomes the principal debtor, of whom the retiring partner is surety; and creditors of the firm, having knowledge of this equity, are bound to regard it in their subsequent dealings with the parties. Shelden *v.* Shelden, Sup. Ct. Mich. 25 Am. L. R. 292.]

(*h*) Various attributes of a partnership favor this view. Thus, the *delectus personarum*, the necessity of a joint suit by or against them, the doctrines of equitable preference, and of the joint and several liability of partners, are well explained on this basis, without resorting to the theory of *quasi* and dependent lien. In many of the cases involving the claims of the joint creditors on the partnership fund, the word "lien" is not used, but the right of the partnership creditor is termed a trust; and, in some cases, is

in one respect, and equality in the other. It seems, however, to have become a rule in the settlement of bankrupt and insolvent concerns, to apply a more just and reasonable principle; namely, to give to the creditors of the partnership all the effects of the partnership if necessary for their debts, leaving only the surplus, if these debts were paid to the private creditors; and to give to the several private creditors the private assets of the several partners, applying only the surplus to the debts of the partnership. (*i*) There was some * fluctuation back and forth; but this principle finally prevailed in England, * 348 and, as almost all insolvencies were settled there in chancery, this may be considered as their method of settling such estates. (*j*) In this country there were some, but rather

held operative directly on the fund, and not through the medium of the partner's lien. Tillinghast *v.* Champlin, 4 R. I. 173; Burtus *v.* Tisdall, 4 Barb. 571, 588.

(*i*) This was first held in A. D. 1715, in *Ex parte* Crowder, 2 Vern. 706; followed by *Ex parte* Cooke, 2 P. Wms. 500.

(*j*) The older rule in bankruptcy, giving a full satisfaction out of the separate estate to the separate creditors, was first broken in upon by Lord Thurlow, in *Ex parte* Hayden, 1 Bro. Ch. 454, which introduced the important modification that the separate estate might be had recourse to, by the partnership creditors, whenever there was neither joint estate nor a solvent partner. This somewhat anomalous rule, making the nature of the debt depend on the presence or absence of joint assets (see per Lord Eldon, in *Ex parte* Pinkerton, 6 Ves. 814, note), seems farther to have been extended, by Lord Thurlow in *Ex parte* Hodgson, 2 Bro. Ch. 5, to an absolute equality as to the separate estate between the joint and separate creditors; and, apparently, this continued to be the rule till the decision of Lord Rosslyn in *Ex parte* Elton, 3 Ves. 238, A. D. 1796, when the principle of the old rule of exclusive satisfaction of the separate creditors from the separate estate — the partnership creditors coming in only for the surplus — was restored, and was followed for some time. *Ex parte* Clay, 6 Ves. 813; *Ex parte* Kensington, 14 Ves. 448. For the history of this fluctuation, see Allen *v.* Wells, 22 Pick. 453; Bardwell *v.* Perry, 19 Vt. 292, where it is concisely set forth; Murray *v.* Murray, 5 Johns. Ch. 60, where it is given at greater length. The earlier rule, restricting the joint creditors from recourse to the separate estate, was adopted from bankruptcy into equity, receiving only the modification that if no joint estate subsisted, and there was no solvent partner, the firm creditors might come upon the separate fund *pari passu* with the separate creditors. See accordingly Cowell *v.* Sikes, 2 Russ. 191; Gray *v.* Chiswell, 9 Ves. 118; *Ex parte* Kendall, 17 Ves. 514. In Gray *v.* Chiswell, it was decided expressly that separate creditors were entitled to be paid first out of the separate fund, if there was any joint fund, however small, for the joint creditors to follow; Lord Eldon remarking that it was the first time the case had been presented in equity, though in bankruptcy the question was familiar. But in Devaynes *v.* Noble, 1 Meriv. 529, 562, 564, it was *held*, by Sir William Grant, that though the common law had, unlike the law-merchant, made all partnership contracts joint, equity, following the law-merchant, would hold them

* 349 faint, * attempts to establish the same principle. Recently these have been renewed with more vigor and more success. And we believe that a principle which is so obviously just and reasonable and consistent with the true theory of partnership, will before long be settled and established with us. (*k*)

several, by operating through its jurisdiction to correct a mistake, to reform the contract. Hence, he *held*, that equity would admit a partnership creditor to come direetly upon the separate estate, without regard to the accounts between the partner and his firm. His ruling was confirmed by Lord Brougham on appeal. 2 Russ. & M. 495. It had been already followed in Sumner *v.* Powell, 2 Meriv. 37; and since in Wilkinson *v.* Henderson, 1 Mylne & K. 582; also, in Thorpe *v.* Jackson, 2 Younge & C. 553, where it was *held*, that the same rule applied also to joint debtors not partners in trade. And this seems to be the undoubted law in England, Story Eq. Jur. § 676; Redfield, J., in Washburn *v.* Bank of Bellows Falls, 19 Vt. 278; and, to some extent, in this country. But this rule is confined solely to cases where the partnership creditors seek to come upon the separate assets of one partner, and there are no competing separate creditors. See the cases cited accordingly; also, Hills *v.* M'Rae, 9 Hare, 297; Harris *v.* Farwell, 13 Beav. 403; Brett *v.* Beckwith, 3 Lond. Jur. N. S. 31. But if there are separate creditors, it seems to be the present equity doctrine that, as to equitable assets, if there be no joint fund or solvent partner, whether the separate estate be solvent or not, the separate creditors must first be satisfied out of their fund, and the joint creditors take only the surplus, if any, Ridgway *v.* Clare, 19 Beav. 311; Addis *v.* Knight, 2 Meriv. 117; Croft *v.* Pyke, 3 P. Wms. 112; while, if both estates are solvent, the joint creditors can come upon either; or, if the joint fund be solvent, and the separate insolvent, the joint creditors can follow the latter, as, by their payment, the separate estate has a credit to that amount in the joint estate, which the separate creditors can pursue. Ridgway *v.* Clare, 19 Beav. 311; *Ex parte* Sperry, 1 Ashm. 357; Walker *v.* Eyth, 25 Penn. St. 216; Lawrence *v.* Trustees of Orphan House, 2 Denio, 577; Patterson *v.* Brewster, 4 Edw. Ch. 352.

(*k*) The preference of the separate creditors, as a rule of equity, is affirmed by Chancellor Kent. Murray *v.* Murray, 5 Johns. Ch. 60; 3 Kent Comm. 65, citing Wilder *v.* Keeler, 3 Paige, 167, Morgan *v.* His Creditors, 20 Mart. (La.) 599; McCulloh *v.* Dashiell, 1 Harris & G. 96; Payne *v.* Matthews, 6 Paige, 19; Hall *v.* Wood, 2 McCord Ch. 302; Bowden *v.* Schatzell, 1 Bailey Eq. 360; Cammack *v.* Johnson, 1 Green Ch. 163. [The joint estate of a partnership is first liable for the joint debts, and the separate estate of the respective partners for their separate debts; and neither class has a right to go to the fund previously belonging to the other, until the creditors having preference are fully paid. *In re* McLean, U. S. Dist. Ct. 15 N. B. R. 333; Murril *v.* Neil, 8 How. (U. S.) 421; Bass *v.* Estill, 50 Miss. 300.] So also see Patterson *v.* Brewster, 4 Edw. Ch. 352; Crockett *v.* Crain, 33 N. H. 452; North R. Bank *v.* Stewart, 4 Bradf. 254; Ganson *v.* Lathrop, 25 Barb. 455; Morrison *v.* Kentz, 15 Ill. 193; Hubbard *v.* Curtis, 8 Iowa, 1. Elsewhere the more modified doctrine is maintained, that the partnership creditors will be admitted *pari passu*, only when they have no joint fund, Bridge *v.* McCullough, 27 Ala. 661; Rodgers *v.* Meranda, 7 Ohio St. 179; [Brock *v.* Bateman, 25 Ohio St. 609;] or there is no solvent partner, Daniel *v.* Townsend, 21 Ga. 155. While in the later

There is perhaps no great practical objection in permitting the creditors of the partnership to go at once for their payment to the partners personally, and their private property, where there is no insolvency of the partnership; because, if a partner is obliged to pay such a debt, he may charge his payment to the firm, and so be allowed it on the general settlement, or in account. This is the present rule and practice; each partner being liable *in solido*, although the whole partnership is solvent and accessible, and the action must be brought against all. (*l*) *But it would be more consistent with the *350 true theory, and in all respects a better rule, we think, if the creditors of the partnership were in no case — fraud, of course, excepted — permitted to proceed against the private effects of a partner severally, until they had exhausted all those means of the partnership which were accessible to them, and available without too much cost or difficulty. (*m*)

cases in New York, &c., it is *held*, that the lien of a firm creditor for a partnership debt, by a judgment thereon, will not be relieved against in favor of a later judgment of a separate creditor. Meech *v.* Allen, 17 N. Y. 300; Wisham *v.* Kay, 1 Stockton, 353.

In Allen *v.* Wells, 22 Pick. 450; Bardwell *v.* Perry, 19 Vt. 292, the doctrine goes somewhat under the peculiar priority law of each State, which makes priority in time of attachment the sole test at law. In equity, however, the rule is clearly maintained that the partnership creditors will come in *pari passu* with the separate creditors, but that equity will interpose to see that those who may have recourse to two funds shall exhaust one before going upon the other on which another creditor relies solely. This same ground is followed in Camp *v.* Grant, 21 Conn. 41; Emanuel *v.* Bird, 19 Ala. 596. [In Massachusetts, by trustee process, a creditor of the firm may attach the private property of one of the partners, in a suit against the firm; and a subsequent attachment by a separate creditor, in a suit against the partners for his individual debt, will not supersede the prior attachment. Stevens *v.* Perry, 113 Mass. 380. *Contra*, in New Hampshire. Bowker *v.* Smith, 48 N. H. 111; Jarvis *v.* Brooks, 23 N. H. 136. In Ohio, trustee process will not lie in such a case. Myers *v.* Smith, Sup. Ct. Ohio, 3 L. & Eq. Reptr. 360.]

(*l*) In cases at law, there never has been a doubt of the immediate liability of each partner to have the judgment against the firm fully satisfied from his assets, or of his liability *in solido*. Woolley *v.* Kelly, 1 B. & C. 68; Herries *v.* Jamieson, 5 T. R. 556; Ld. Eldon in *Ex parte* Ruffin, 6 Ves. 119; Abbot *v.* Smith, 2 W. Bl. 949, per De Grey, C. J.; Jones *v.* Clayton, 4 Maule & S. 349; Villa *v.* Jonte, 17 La. Ann. 9; Nicholson *v.* Janeway, 1 Green (N. J.), 285.

(*m*) See *ante*, pp. *348, *349, and notes.

SECTION II.

OF THE SUIT, ATTACHMENT, AND LEVY OF A PRIVATE CREDITOR AGAINST A PARTNER PERSONALLY INDEBTED TO HIM.

When we come to the question of the rights and remedies of a private creditor of one partner in respect to that partner's share of the partnership, we shall find much uncertainty still remaining. We apprehend, however, that a careful adherence to two principles will remove most of the difficulty. One of these is, that a creditor of any debtor can secure to himself, and for his own benefit by attachment and levy, only the property, interest, or right which his debtor has; (*n*) the other is, that this he may thus secure. The first point, therefore, is to adopt no theory and no conclusion which will offer to an attachment, or to execution, any thing more or any thing else than the debtor has.

What, then, is the right or interest or property of a partner to or in the effects of the partnership? Certainly, not a separate and exclusive right to any part or portion of it; or any right of any kind to any one part rather than to any other part; or any other right or interest than that which all the other partners have. (*o*) It follows, therefore, that he can have no
* 351 right or * interest which is such in kind or in degree as prevents all or any of his copartners from having precisely the same; and the right which he has is the same as theirs in reference to the whole and every part of the property. We cannot, therefore, define this right of any one partner better than we have already done, by calling it an ownership of all the property of the firm, subject to the ownership of the copartners, who hold it all subject to his ownership. This is at least the foundation of his property and interest; and from this he derives certain rights as incident to it. Thus, if no special

(*n*) See *ante*, p. *343, note (*c*), and cases cited. And see Smith *v.* Emerson, 43 Penn. 456.

(*o*) Lovejoy *v.* Bowers, 11 N. H. 404; Black *v.* Bush, 7 B. Mon. 210; Daniel *v.* Daniel, 9 id. 195; Church *v.* Knox, 2 Conn. 518. And see *ante*, p. *343, note (*c*), the cases which admit the partner's interest alone to be taken. See Cookingham *v.* Lasher, 38 Barb. 656.

agreement forbids, each partner may disencumber his interest from the rights of the others, by giving up his right to all the other shares or interests. That is, each one may have his own share in severalty. But, to do this, the first step is to ascertain what this share is. For it must be remembered, not only that the ownership of each partner is subject to the ownership of all the others, but that all the partners together hold the property subject to the right and obligation of the partnership as a body *per se*, to apply all its funds to the payment of all its debts. (*p*) Or, if this way of presenting this right be objected to, then we say that all the partners own all the property, subject to the right of all the creditors to have their debts paid and satisfied out of this property. (*q*)

The partner who desires to separate his share of the common property, and own it free from any liability to others or any * interest in others, must settle the concerns of the * 352 partnership in the first place, so as to be sure that the debts are paid or provided for; and then he may call for a division of the joint property, and take his share to himself. He may do many other things by the consent of others: he may in that way sell out his interests to a stranger, or to a third person, who is to come into the partnership; or he may sell to his copartners. But no such arrangement liberates his

(*p*) Washburn *v.* Bank of Bellows Falls, 19 Vt. 292; [Warren *v.* Willis, 38 Tex. 225.]

(*q*) This ownership by partners, subject to the claims of creditors of the firm, is made by Richardson, J., the foundation of an able dissenting opinion against the right of a sheriff to take specific articles of the partnership stock for the debt of one. Wiles *v.* Maddox, 26 Mo. 77, 84. So by Parker, C. J., in Morrison *v.* Blodgett, 8 N. H. 238. In 4 Strobh. Eq. 25, it is *held*, that the share of each partner in the joint effects is subject to his partners' liens for joint demands, and, though aliened, was subject to their equities for a settlement. The right or lien of the partners on the joint property for their own shares, and for the payment of the partnership debts, is, however, an equity of theirs, and not primarily, if at all, of the partnership creditors, Hunt *v.* Waterman, 2 R. I. 298; Miller *v.* Estill, 5 Ohio St. 508; and may be barred, or the property removed from its operation by any *bonâ fide* assignment, *Ex parte* Ruffin, 6 Ves. 119; *Ex parte* Williams, 11 id. 3; Miller *v.* Estill, 5 Ohio St. 508; Smith *v.* Edwards, 7 Humph. 106; Holderness *v.* Shackels, 8 B. & C. 612; Lingen *v.* Simpson, 1 Sim. & S. 600; Campbell *v.* Mullett, 2 Swanst. 575; *Ex parte* Fell, 10 Ves. 347; Griffith *v.* Buck, 13 Md. 102; Rogers *v.* Nichols, 20 Tex. 719; Stout *v.* Fortune, 7 Iowa, 183; Jones *v.* Lusk, 2 Metc. (Ky.) 356; Holmes *v.* Hawes, 8 Ired. Eq. 21; Wilson *v.* Soper, 13 B. Mon. 414; Reese *v.* Bradford, 13 Ala. 846; *Ex parte* Peake, 1 Madd. 358. See *ante*, p. *345.

share from the debts of the firm; and nothing will but their payment, or the agreement of the creditors, for consideration, to discharge him. What the law permits him to do, or cause to be done, without the consent of others, is to settle the concern, pay the debts, and then divide the surplus. This is, practically speaking, the whole of his right. And this, and only this, is therefore the right which his private creditor can acquire by attachment or execution. That is, his creditor may put himself exactly in the place of his debtor, both as to the power of the latter and as to its limitations. (*r*)

The creditor may, therefore, attach the interest of the debtor partner in the partnership property. This is universally admitted. (*s*) But can he attach the very goods of the partnership? or, to state the question more accurately, Can the officer having the writ attach any definite portion of the goods of the partnership, and take them into his possession; or can he, holding an execution, take a portion of the goods, and sell them to satisfy it? There is much diversity of opinion on this subject; but we are unable to regard it as at all doubtful on principle; that is, the conclusion to which the principles applicable to the case lead seems to us inevitable. If
*353 there be any doubt, it must arise from *the inability of the law of partnership to clear itself of the last remaining influence of the old notion, that partnership was but one form of tenancy in common. (*t*) The partner himself is

(*r*) Tappan *v.* Blaisdell, 5 N. H. 193. See Inbusch *v.* Farwell, 1 Black (U. S.), S. C. 566.

(*s*) Chapman *v.* Koops, 3 Bos. & P. 289; Moody *v.* Payne, 2 Johns. Ch. 548; per Parker, C. J., in Morrison *v.* Blodgett, 8 N. H. 252, 253; Jarvis *v.* Hyer, 4 Dev. 367; Johnson *v.* Evans, 7 Man. & G. 240; Mayhew *v.* Herrick, 7 C. B. 229; Holmes *v.* Mentze, 4 Adol. & E. 127. So the share may be taken on *mesne* process in those States which confer this right. Pierce *v.* Jackson, 6 Mass. 242; Burgess *v.* Atkins, 5 Blackf. 337; Douglas *v.* Winslow, 20 Me. 89, 92, 93. Thus, in Pierce *v.* Jackson, Parsons, C. J., says: "A creditor of one of the firm has a right to attach the partnership effects against all creditors whose demand is not upon the company." See also Allen *v.* Wells, 22 Pick. 450; Washburn *v.* Bank of Bellows Falls, 19 Vt. 278; Bardwell *v.* Perry, 19 id. 292; Dow *v.* Sayward, 12 N. H. 276, 277; Page *v.* Carpenter, 10 id. 77; Hill *v.* Wiggin, 11 Fost. 292; Newman *v.* Bean, 1 id. 93; James *v.* Stratton, 32 Ill. 202.

(*t*) And that this is so, see the later cases of Johnson *v.* Evans, 7 Man. & G. 240; Mayhew *v.* Herrick, 7 C. B. 229, in which the court found the right of the sheriff to take possession of specific articles, on the old law as it stood in Heydon *v.* Heydon, 1 Salk. 392, Jackey *v.* Butler, 2 Ld. Raym. 871,

wholly without the right (unless by agreement) of appropriating to himself in severalty any thing whatever which belongs to the common stock. All the partners together cannot do it, if it be needed for the payment of the debts. (*u*) This is universally conceded. If a private creditor of a partner attaches his interest in any form, his attachment is certainly avoided by the insufficiency of the joint assets to pay the joint debts. (*v*) How, then, can it be *held*, either that the partner, before settlement of the debts and a division of the property, may, by his own act, make some portion of it his own; or that the partner himself has no such right, but that his private creditor may say the partner has such right, and possess himself of it by attachment or levy or execution? The courts which have, in recent times, permitted a sheriff to attach the property of a firm in a suit against a partner, and sell the same on execution, hold also that he must not pay this over to the plaintiff, but must hold the proceeds subject to an account with the firm, to be paid to them for their creditors if needed for debts, or for the other partners if it belongs to them on the settlement. Or else that the purchaser takes the property as

Bachurst *v.* Clinkard, 1 Shower, 169; namely, permitting the interest of one partner to be taken as an undivided moiety. See Garvin *v.* Paul, 47 N. H. 158.

(*u*) As to the restriction upon the partners to assign in case of insolvency, actual but not avowed or acted upon by process of court, see Allen *v.* Centre Vale Co., 21 Conn. 130. And see Jones *v.* Lusk, 2 Metc. (Ky.) 356; Dennis *v.* Green, 20 Ga. 386; Burtus *v.* Tisdall, 4 Barb. 571; Lucas *v.* Laws, 27 Penn. St. 211.

(*v*) And this is true even though the partnership creditors have commenced no action for the recovery of their debts. Pierce *v.* Jackson, 6 Mass. 242; Fisk *v.* Herrick, 6 id. 271; Rice *v.* Austin, 17 id. 206; Commercial Bank *v.* Wilkins, 9 Greenl. 28; Lyndon *v.* Gorham, 1 Gallison, 368. [The true reason why the resulting interest of a partner in the partnership effects cannot be attached or taken on execution lies in the nature of the interest, which is not a specific thing, having a distinct and independent existence; but is a mere result flowing from a comparison of accounts, and may fall on either side as the balance happens to be. A specific debt or demand may be unliquidated, but nevertheless has its own independent existence, and may be ascertained by computation or valuation. Not so with the interest of a partner in an unsettled partnership account. It results wholly from a comparison of the debts and credits of the partnership in the first instance, and then a comparison of the accounts between the partners themselves. If the partnership is insolvent, there is no balance for division; if solvent, then the account between the partners may show that the partner whose interest it is attempted to attach has no claim to any part of the balance. Agnew, J., Alter *v.* Brooke, 9 Phila. 258; Knerr *v.* Hoffman, 15 P. F. Smith, 126.]

tenant in common with the other partners, and subject to an account between the partners, which, if it eventuate against him, will make his purchase give him nothing. (*w*) This is an acknowledgment that the partner holds his interest
* 354 in the joint property * on terms and conditions which make it unreasonable to subject that property itself to attachment as his property.

We should say, therefore, that there is no general rule of the law of partnership which rests on stronger reason than that a private creditor cannot do this. But this rule is perhaps subject to some qualification. How, for example, is the creditor affected by private agreements or arrangements between the partners? (*x*) These may be of two kinds: they may be favorable to the creditor, or unfavorable. Thus, if the articles of copartnership permitted any one partner to withdraw one-third of the stock at his pleasure, or some specific articles of the joint property, it would be for the advantage of the creditor to acquire this right. If by the articles no partner could ask for a settlement, or withdraw any stock, for five years, it would be a hindrance to the creditor to be delayed so long.

In considering the question how a private creditor of the partner would be affected by such a bargain, if it were unfavorable, if, — for example, the articles of partnership provided that an account should be taken annually, and all the profits added to the stock for five years, and that the partnership should not be dissolved, or any of its stock withdrawn, for five years more, and eight of these ten years remained, — it might be supposed that the well-known principle, in constant application, that no bargains between the partners affect injuriously any third person dealing with the partnership in ignorance of these bargains, would apply to this case. The reason of this

(*w*) Phillips *v.* Cook, 24 Wend. 398, 404; Johnson *v.* Evans, 7 Man. & G. 240; Mayhew *v.* Herrick, 7 C. B. 222; Lucas *v.* Laws, 27 Penn. St. 211; [White *v.* Jones, 38 Ill. 159. If the interest of both members of a partnership consisting of two be sold on separate executions against each to the same purchaser, he gets nothing till the partnership debts are paid. Osborn *v.* McBride, U. S. Dist. Ct. Cal. 16 N. B. R. 22. See also Menagh *v.* Whitwell, 52 N. Y. 146; Bank *v.* Carrolton R. R., 11 Wall. (U. S.) 624; Garvin *v.* Paul, 47 N. H. 158; Barrett *v.* McKenzie, 1 N. W. Reptr. 123, S. C. Minn.]

(*x*) Elliott *v.* Stevens, 38 N. H. 311, 313.

principle is, that all persons have a right to believe that all partnerships stand on the common ground of the law, unless they are informed that it is otherwise. If this rule were held to apply to an attaching creditor, we should say that a private creditor of a partner, who knew of such an agreement when he gave him credit, should be bound by it as much as he would be by any other lien or encumbrance on the partner's property. But that, if he had no such knowledge or means of knowledge, he would be unaffected by the agreement. There are cases which would, indirectly at least, favor this conclusion. (*y*) But as all partners have a right to make any honest disposition of their affairs, or any arrangements between themselves, which do not injuriously affect those who deal with the
* firm, we should prefer to say that an attaching cred- * 355
itor of one of the partners would be bound by such a bargain, if made in entire good faith, and with no reference to any insolvency either of the partner or of the firm. Practically, however, it would make little or no difference. Where the interest of the debtor was sold on execution, we apprehend that this would work a dissolution of the partnership. The remaining partners would not be bound to admit the purchaser as their partner during these years; and, on the other hand (the *delectus personarum* being mutual and equal), the purchaser would not be bound to become and remain a partner with the others, against his wishes. The parties could, of course, make what arrangement they chose. But, if they could not agree, the legal effect of the sale and purchase would be a dissolution; and the legal effect of this would be an annulling of those agreements, and a right on the part of the purchaser to call at once for an account and settlement, and to take his share in severalty.

On the other supposition, that, if the partner had made an agreement adding to or enlarging his rights, the principle that the creditor takes just what the debtor has, and is put precisely in his place, would give to him all the benefit of this agreement. And the fact that he did not know it, would not prevent his profiting by it, any more than it would prevent him

(*y*) See Penn *v.* Stow, 10 Ala. 209.

from profiting by property, theretofore unknown to him, of the partnership or of the partner.

No theory can be adopted, in relation to the partner's right and its liability to attachment, which will not give rise to difficult questions, that cannot be definitely answered without the aid of adjudication. Thus, while we assert that the partner's separate interest is not, as a general rule, open to attachment or execution, the question arises, whether circumstances may not authorize such attachment. We will suppose an English firm, of which all the partners are resident English subjects. One of them visits this country, and in his individual capacity here contracts a large debt; and while he is here a large amount of the property of the firm arrives here. We suppose, further, that the firm is perfectly solvent, but that this partner refuses here to pay this debt, and has no effects in this country which could satisfy this debt. The question would then arise, whether his creditor might not attach his interest in this
* 356 property, and sell it on * execution, if, after due notice and opportunity, the firm did not lease this property by substituting for it an equivalent or security for this partner's interest in it. The principle, that no creditor of a partner could take by attachment more than the partner himself has, would distinctly deny that such attachment or levy could be made in the case above supposed. One reason, however, occurs to us for permitting such attachment, which may be found in an analogy between such a case and that of a foreign bankruptcy. Our courts have decidedly refused to hold our citizens so far bound by a transfer of property by foreign bankruptcy as to lose their right of attaching the property of the bankrupt in this country, and, instead of this, trust only to receiving a dividend with the creditors abroad. (*z*) The cases certainly are not the same; but the creditor of the separate partner in this country cannot here attach his individual interest in the partnership property, to any purpose, without attaching the property itself; for the goods may be sold or sent abroad, and then the officer has not within his reach the means of satisfying the judgment which he has if he attaches the interest of the partner in a home firm.

(*z*) See 3 Parsons on Cont. (5th ed.) 449–455.

It may be that the courts would adhere to the principle, that the property belongs to the partnership, and not to the several partners, so far that it is not open to attachment or levy even by the creditor of a partner, when he and the property are far from their home, and in the home of the creditor. But if we suppose that the reason above suggested, with others growing out of the case, might make this exception, it would apply probably to the different States of this Union; which, for most purposes in the law-merchant, are foreign to each other.

The question might then arise, how the firm could liberate their property from such attachment. Of course, they could charge in their account with their partner whatever they lost by a compelled payment of his debt. We think that they could not tender, instead of the property, the whole of that partner's interest in that specific property, and require the surrender thereof; for we apprehend that he has no more an interest in any special part than he has a full property in every special part. Then, could they tender the whole of his interest in all the property of the firm, and claim the protection of the courts in liberating their property * thereupon? We * 357 think not; because, if they could do this as a matter of right, they might do it although the property was nearly all wanted for the debts, and the balance to each partner was trifling; and then the creditor would find the goods withdrawn to pay debts abroad, and his security lost; which is precisely what our courts will not subject him to in the case of foreign insolvency; and we suppose the attachment itself would be permitted, if at all, mainly on the ground of an analogy to the case of insolvency. Indeed, if a tender of the partner's interest, whatever that may be, would liberate the property, it should be free from attachment or levy whenever there was no interest; or, in other words, whenever the firm was insolvent, or could only pay its joint debts.

We have presented these questions for consideration, because we know that they have actually arisen, although they did not pass under adjudication; but the reasons on the one side and the other seem to us so nearly balanced that we must wait for authority to decide them.

The general conclusion to which we come, — and on this we rely very confidently, — is, that a separate creditor of a part-

ner, in pursuing his remedy upon property of the firm, can attach or levy upon the partner's interest in the copartnership property, and upon nothing else. (*a*) But even where this is held, there is much diversity and uncertainty as to the proper manner of doing it. We think, however, that a clear apprehension of the principle itself would lead to a sufficient and unobjectionable method of carrying that principle into effect.

We have no doubt that this interest of the partner may be attached as well as any other interest or property, and levied upon, and sold, to satisfy a judgment. The manner in which this is done must depend somewhat upon the local statutory provisions. In general, an officer ordered to attach this interest would do so by indorsing such attachment on his writ; he should then certainly give immediate notice to the debtor, and it would be expedient and proper to give such notice to the other partners. This interest would remain under attachment. We think that the firm could go on, dealing as before, buying and selling, and delivering goods; (*b*) because this at-
* 358 tachment did not take effect * upon any specific interest in any specific goods, but on the interest of the partner in the partnership concern; and we incline to the opinion that it would be held to affect the defendant's interest in new merchandise added to the stock, in the course of dealing, as much as in the old; although this conclusion could not be reached by the court without applying equitable principles to the case.

We suppose that the transactions of the firm, after being notified of the attachment, are in good faith; and, if so, it is no objection to them that the debtor himself is active in these transactions, or in part of them. But, whether he be active or not, if the transactions are fraudulent as against the creditor, — that is, intended to delay or defeat the recovery of his debt, — they might still be valid as against him, and in favor of a

(*a*) See *ante*, p. *352, note (*s*); p. *343, note (*c*).

(*b*) The property of the partner in his share is not entirely divested, and the firm consequently dissolved, till sale under the levy. Morrison *v.* Blodgett, 8 N. H. 238; Aspinall *v.* London & N. W. R. Co., 11 Hare, 325; but a sale of any part, however small, of the specific goods under execution, is a dissolution. Id.; Habershon *v.* Blurton, 1 De G & S. 121; Waters *v.* Taylor, per Lord Eldon, 2 Ves. & B. 301. The same mode of attachment without seizure was *held* to be the only proper form in Pennsylvania. Deal *v.* Bogue, 20 Penn. St. 229.

stranger dealing honestly with the firm in their way of business: but would be void in favor of the creditor, as against the fraudulent partners, and as against any third party co-operating in the fraud, or dealing with the partners knowing the intention of fraud, and by thus dealing giving it efficacy; for this would be co-operation, although the third party had no other object in view but his own interest.

So affairs might go on until judgment was obtained, and an execution issued. For, if not, it would be in the power of any person, by mere suit and allegation of a demand against a partner, to arrest the whole business of a partnership more effectually than he could do it by the allegation of a debt against the partnership itself.

When execution issued, the sheriff would sell the interest of the partner in the partnership in the same manner in which he would sell any other interest or right which he levied upon, — as a right to redeem, or the like; and the proceeds would be applied to satisfy the execution. (*c*)

* The purchaser would not become a partner; but he * 359 would stand in the place of the partner whose interest he bought, and acquire all of his rights which were necessary to make this interest valuable and available. That is, he would have the right to call for an account, and a settlement of the partnership concern, and to take his share of any surplus in severalty. And a court of equity would probably render him the same assistance in obtaining or enforcing these rights that they would to the partner whose interest he has bought. This,

(*c*) This is admitted as the consequence of such levy and sale in the case of Wiles *v.* Maddox, 26 Mo. 77, 84. The doctrine of the majority of the court in that case is sustained by the decisions of every law court except those of New Hampshire, Morrison *v.* Blodgett, 8 N. H. 238; Gibson *v.* Steven, 7 N. H. 357; Page *v.* Carpenter, 10 N. H. 77; Hill *v.* Wiggin, 11 Fost. 292, &c.; and of Pennsylvania, Deal *v.* Bogue, 20 Penn. St. 229; and of some earlier cases in New York, Crane *v.* French, 1 Wend. 313; *Ex parte* Smith, 16 Johns. 102; which were all conclusively overruled in Phillips *v.* Cook, 24 Wend. 397; Waddell *v.* Cook, 2 Hill, 47, and note; Walsh *v.* Adams, 3 Denio, 125, &c. Even in New Hampshire, the unfortunate effects of the ordinary method of attachment without the power to make it operative except in equity, because a mere contingent right is sold that no one cares to buy, have been so severely felt, that, in Hill *v.* Wiggin, the result is described by the judge as affording a secure means for fraudulent debtors to get their money securely out of the reach of the law. Hill *v.* Wiggin, 11 Fost. 292, 296.

however, like almost every thing else in equity, would be addressed to the discretion of the court, and could not be claimed as a matter of strict and technical right. For if the case were one which admitted of easy and accurate estimate, and certainly sufficient tender, and this were made, the court would not require a settlement which would be injurious to the partnership, and was asked for by this purchaser only for oppressive or dishonest purposes.

An additional step to that of attaching the separate partner's interest has been suggested on high authority. (*d*) It is
* 360 to sue the * indebted partner by process of foreign attachment or garnishee process or trustee process, as it is variously called, and make the other partners trustees. They would then be required to answer under oath; and the interests, rights, and property of the principal defendant in their hands might thus be more effectually held. It might be that our courts would find some difficulty in the complete application of such a system to practice, unless they were aided by legislative provisions; (*e*) and perhaps no other questions of commercial law call so loudly, at this time, for such provisions.

We have already remarked, that the attachment by a separate creditor of a partner, of his debtor's interest in the partnership, or of the goods themselves, is vacated by the insolvency of the partnership, which leaves in the partner no interest, and

(*d*) In Morrison *v.* Blodgett, 8 N. H. 238, Parker, C. J., suggested, as a means of rendering available an attachment of the partnership effects for the private debt of a partner, the expediency and necessity of summoning the other partners as trustees. See also Treadwell *v.* Brown, 43 N. H. 290. A similar suggestion had previously been made by Parsons, C. J., in Fisk *v.* Herrick, 6 Mass. 271, where a debtor of the partnership had been ineffectually summoned as trustee in a suit against one partner of the creditor firm; and in Lyndon *v.* Gorham, 1 Gallison, 261, Mr. Justice Story recognized that course as likely to obviate some of the difficulties in the case then before the court. But we know of no case in which a portion of the members or the whole partnership have been held as trustees in a suit of foreign attachment, upon the private debt of one partner. The course thus suggested and approved is entitled to the highest consideration, and may prove to be practically the best that can be pursued in the present condition of the law. But it is obvious that the law of partnership, taken in connection with the law of trustee process or foreign attachment, offers some difficulties; and we do not know that this course has been generally adopted.

(*e*) See Field *v.* Crawford and Trs., 6 Gray, 116; Lane *v.* Felt, 7 id. 491; Treadwell *v.* Brown, 41 N. H. 12; Bulfinch *v.* Winchenbach, 3 Allen, 161.

requires all the property to pay the debts. (*f*) But it is also vacated by the fact of insolvency, prior to any proceedings founded thereon, whether there be a general process of insolvency or suits by individual creditors. But a distinction seems to be taken in this respect between the case of a dormant (that is, secret) partner and a known partner. Thus, if a man in business have a dormant partner, and a creditor of the first sue him and attach his goods, this attachment shall not be postponed to a later attachment by another creditor, who discovers this unknown partner, and makes him defendant. (*g*) For, if both creditors stand on equal ground as to their claims, the fact that one happens to discover, and sues, a partner not publicly known, should give him no advantage over one who sues in fact the partnership, and uses all the names that the firm enables him to know. It is not so, however, in its reason, and, we think, not on authority, where the creditors stand on different grounds. Thus, if the first creditor dealt with the known partner only, and did not deal with him in fact on partnership account, but did attach partnership property, then this attachment must yield to one on which partnership property is taken in a suit * properly brought * 361 against all the partners. And we apprehend the result should be the same although the known partner was the only defendant in both writs. That is, if a man transacted business on his sole account, and also had a secret and silent partner, and with him transacted another business, which was distinctly a partnership business, and became insolvent, and creditors in his own business attached his property, and creditors in the partnership business also attached the property, either before or after the others, we suppose that a court of equity, if it could discriminate the debts and discriminate the property, would give relief, and appropriate the partnership property to the partnership debts, and the private property to the private debts. And we should suppose that courts of law would now, generally at least, follow the same rule to the same result.

(*f*) Lyndon *v.* Gorham, 1 Gallison, 367; Commercial Bank *v.* Wilkins, 9 Greenl. 28. And see Fisk *v.* Herrick, 6 Mass. 271; Upham *v.* Naylor, 9 id. 490; Church *v.* Knox, 2 Conn. 514.

(*g*) French *v.* Chase, 6 Greenl. 166; Lord *v.* Baldwin, 6 Pick. 348. See also Cammack *v.* Johnson, 1 Green, Ch. 164; Allen *v.* Dunn, 15 Me. 292.

CHAPTER XI.

OF THE REAL ESTATE OF A PARTNERSHIP.

SECTION I.

GENERAL CONSIDERATIONS.

FORMERLY, the title of this chapter could have found no place in a treatise on the law of partnership. The distinction which existed at common law between real estate and personal estate has been bridged over only of late. It used to be deemed that the purposes of partnership, and the means which it used, excluded all reference to land, and that the law of partnership could not with propriety speak of land. (*a*) But in England this doctrine has long been greatly modified; and now, by the assistance of equity, a tolerably convenient and consistent system is in force there. Mr. Justice Story, in his treatise on Partnership, remarks (§ 93): "The doctrine (as to real estate), under these circumstances, must be considered as open to many distressing doubts." We apprehend, however, that a careful consideration of American cases will show that, in this country, most of these doubts have been dispelled. Indeed, few questions remain, in relation to this subject, as to which authority, illustrated by the reasons and principles which are unquestionably applicable, do not give us a sufficiently distinct and definite answer.

There are two reasons why we might have expected an improvement in the American law on this subject over that of

(*a*) In Pitts *v.* Waugh, 4 Mass. 424, where it was sought to charge a person as partner in an action for the price of land sold to the ostensible partner alone, the court said, "The law-merchant does not extend to speculations in land;" and it was formerly considered in England that the rule, *jus accrescendi inter mercatores locum non habet*, applied only to personal property; and it was also thought necessary to provide against survivorship in the partnership articles. Jeffreys *v.* Snell, 1 Vern. 217.

England. One is, our less rigid conservatism; or, in other words, the weaker *influence of precedent and *363 prescription, and the greater facility of change. This reason, however, applies to the whole body of our law. The other applies peculiarly to this topic. It is, that land is, with us, vastly more a matter of merchandise than in England. It is every day's practice for individuals and partnerships to engage in business, of which the principal, and sometimes the only, element is trade or speculation in land. (*b*) There is nothing to make this illegal, or, within proper bounds, impolitic or undesirable. At all events, the law recognizes it, and must take charge of it, as of all other social or business movements. Questions to which such business as this gives rise not only come before our courts with great frequency, and demand for their settlement well-considered and well-established principles, but they come in such a form as to compel important modifications of the technical law of real estate. (*c*)

It must be obvious that these questions connect themselves with many others. But the remaining influence of the peculiar law of real estate — an influence which must remain until our whole system of law is changed by legislative authority — imparts to all the details of this subject a character peculiar to them and common to them all; (*d*) and it is thought best to gather under one head all that the law and practice of our American courts have to say about the real estate of a partnership.

(*b*) This, after some doubts, see Pitts *v.* Waugh, 4 Mass. 424, Blake *v.* Nutter, 19 Me. 16; Coles *v.* Coles, 15 Johns. 169, in cases occurring before courts of law, was early recognized in this country. See Dudley *v.* Littlefield, 21 Me. 418; Fall River Whaling Co. *v.* Borden, 10 Cush. 469; Black *v.* Black, 15 Ga. 445; Gray *v.* Palmer, 9 Cal. 616; Smith *v.* Jones, 12 Me. 337; Ludlow *v.* Cooper, 4 Ohio St. 1; Coster *v.* Clarke, 3 Edw. Ch. 238; Patterson *v.* Grace, 10 Ala. 444; Rowland *v.* Boozer, id. 690; *In re* Warren, Daveis, 320. And in England, Dale *v.* Hamilton, 5 Hare, 369; Darby *v.* Darby, 3 Drewry, 495.

(*c*) Dudley *v.* Littlefield, 21 Me. 418; Coster *v.* Clarke, 3 Edw. Ch. 238; Darby *v.* Darby, 3 Drewry, 495; Dilworth *v.* Mayfield, 36 Miss. 40; Brady *v.* Calhoun, 1 Penn. 140; Woodbridge *v.* Wilkins, 3 How. (Miss.) 360; Markham *v.* Merrett, 7 How. (Miss.) 437.

(*d*) See *post*, section 3d of this chapter.

SECTION II.

WHEN AND BY WHAT MEANS REAL ESTATE BECOMES PARTNERSHIP PROPERTY.

The general rule is undoubtedly this: Real estate
* 364 purchased * for partnership purposes, and appropriated to those purposes, paid for by partnership funds, and necessary for partnership purposes, always becomes partnership property. (*e*) Nor does it seem to be material in what manner, or by what agency, the land is bought, or in what name it stands. (*f*) It may be conveyed to all the partners as tenants in common, and this perhaps is the usual and the best way; (*g*) or to one or more of the partners, in trust for the whole partnership, and this is not uncommon; (*h*) or to a stranger, under a similar trust, and this is sometimes

(*e*) Dyer *v.* Clark, 5 Metc. 562; Howard *v.* Priest, id. 582; Burnside *v.* Merrick, 4 Metc. 587; Delmonico *v.* Guillaume, 2 Sandf. Ch. 336; Buchan *v.* Sumner, 2 Barb. Ch. 165, 197; Duhring *v.* Duhring, 20 Mo. 174; Matlock *v.* Matlock, 5 Ind. 403; Patterson *v.* Blake, 12 id. 436; Davis *v.* Christian, 15 Gratt. 11; Pierce *v.* Trigg, 10 Leigh, 246; Jones *v.* Neale, 2 Patton & H. 339; Lacy *v.* Waring, 25 Ala. 625; Andrews *v.* Brown, 21 id. 437; Owens *v.* Collins, 23 id. 837; Pugh *v.* Currie, 5 id. 446; Tillinghast *v.* Champlin, 4 R. I. 173; Buckley *v.* Buckley, 11 Barb. 43; Blake *v.* Nutew, 19 Me. 16; Holland *v.* Fuller, 13 Ind. 195, 199; Overholt's Appeal, 12 Penn. St. 222; Deloney *v.* Hutcheson, 2 Rand. 183; Hunt *v.* Benson, 2 Humph. 459; Forde *v.* Herron, 4 Munf. 316; Goodburn *v.* Stevens, 5 Gill, 1; Sigourney *v.* Munn, 7 Conn. 11; Jarvis *v.* Brooks, 7 Fost. 37; Cox *v.* McBurney, 2 Sandf. 561; Brooke *v.* Washington, 8 Gratt. 248; Peck *v.* Fisher, 7 Cush. 386; Fall River Whaling Co. *v.* Borden, 10 Cush. 458; Savage *v.* Carter, 9 Dana, 408, 410, 411; [Fairchild *v.* Fairchild, 64 N. Y. 471.] These cases maintain the general proposition in America. [And this partnership title may be proved by parol, notwithstanding the paper title. Sherwood *v.* St. Paul, &c., 21 Minn. 127; York *v.* Clemens, 41 Iowa, 93; *ante*, p. * 7.] So in England, Phillips *v.* Phillips, 1 Mylne & K. 649; Houghton *v.* Houghton, 11 Sim. 491; Townshend *v.* Devaynes, Montagu on Part. App. 96. And see Roper on Husb. & W. (Jac. ed.) 346, n.; Broom *v.* Broom, 3 Mylne & K. 443; Morris *v.* Barrett, 3 Younge & J. 384. See also Kendall *v.* Rider, 35 Barb. 100; Dupuy *v.* Leavenworth, 17 Cal. 262; Buffum *v.* Buffum, 49 Me. 108; Moran *v.* Palmer, 13 Mich. 367; North Penn. Coal Co.'s Appeal, 45 Penn. 181; Willis *v.* Freeman, 35 Vt. 44; Fowler *v.* Bailey, 14 Wis. 125.

(*f*) Gilchrist, C. J., in Jarvis *v.* Brooks, 7 Fost. 37, 67; Dyer *v.* Clark, 5 Metc. 562; Howard *v.* Priest, id. 582; Pugh *v.* Currie, 5 Ala. 446.

(*g*) Dyer *v.* Clark, 5 Metc. 562; Howard *v.* Priest, id. 582. See Columb *v.* Read, 24 N. Y. 505; and as in many States joint tenancy is abolished by statute, deeds to the partners, by their individual names, create at law, in such States, an estate in common.

(*h*) Coster *v.* Clarke, 3 Edw. Ch. 428; McGuire *v.* Ramsey, 4 Eng. (Ark.) 418.

although not often done. (*i*) Nor is it necessary that the trust should be expressed; for, however proper and expedient this is, yet, if the trust be wholly omitted and have no existence on record, the law will sometimes, (*j*) and equity always, supply this * want, and treat the ownership as * 365 a distinct trust, if only the trust exist and is capable of proof, and the land be in fact and substance partnership property. We consider it an established rule in equity, that any party holding the legal title to land, however it may have come to him, will be held as trustee for the partnership, if it be certain that the land was in fact a part of their joint property as partners. (*k*) But although it be held in the joint name of two or more persons, if there be no proof that it was purchased with partnership funds for partnership purposes, it will be considered as held by them as joint-tenants, or tenants in common; and if they are copartners in the ownership of the land, the partnership as to that will be terminated by a sale of the land, excepting so far as the proceeds are needed for the debts of the partnership. (*kk*)

We consider that the three elements we have above stated must unite, in order to make the real estate *necessarily* partnership property. (*l*) For if it be not purchased for partnership

(*i*) Per Gilchrist, C. J., in Jarvis *v.* Brooks, 7 Fost. 37, 67; Moreau *v.* Saffarans, 3 Sneed, 600; per Story, J., in Hoxie *v.* Carr, 1 Sumner, 173, 182.

(*j*) The interference of a common-law court in behalf of the *cestui que trust* beneficially interested in the partnership real estate, is ordinarily only indirect and to a limited extent; as in the case of a levy on execution of a private creditor. This it does in pursuance of a rule sometimes asserted in equity, that upon such levy only the separate interest of the debtor can be sold; and it gives effect to this rule by rendering the sheriff liable in trover or trespass if he sell more than this; or by suspending judgment to await the result of a pending suit in equity, as in Peck *v.* Fisher, 7 Cush. 386; or in some such indirect mode. For a stay of sale, resort must be had to chancery to obtain an injunction. And in most other cases, protection for this trust must be sought in equity.

(*k*) Such a trust is necessarily implied in favor of the partnership where the property has been made partnership property under the limitations above; that is, bought with partnership funds for partnership purposes, and employed for such purposes. See Dyer *v.* Clark, 5 Metc. 562; Pugh *v.* Currie, 5 Ala. 446; Morris *v.* Barrett, 3 Younge & J. 384; Owens *v.* Collins, 23 Ala. 837. The doctrine rests on the broad foundation of a resulting trust.

(*kk*) Thompson *v.* Bowman, 6 Wallace, 316.

(*l*) Whether real property shall become partnership stock or not is a question of intention. Per Story, J., in Hoxie *v.* Carr, 1 Sumner, 183; also, see Fall River Whaling Co. *v.* Borden, 10 Cush. 462. But this intention may,

purposes, and even if it be paid for by partnership funds, and is in fact appropriated to the purposes of the partnership, it is very possible that one partner is the owner of it, and is to be charged with its value on the books, and credited with fair compensation for its use. Such a fact may be proved; but it will not be presumed. (*m*) So, if not paid for by partnership funds, then it is probably his property who does pay for it, whatever use he permits to be made of it. (*n*) And if not appropriated to the purposes of the partnership, however purchased and paid for, it is possible that the firm, perhaps changing their intention, from the unfitness of the estate for their use or for any other reason, had agreed that it should be his alone who uses it, and that he should pay the firm for it in some way. (*o*)

so far as all claimants, except *bonâ fide* purchasers without notice, are concerned, be *held* sufficiently established, if the purchase is made with partnership funds, even without intended or actual use for partnership purposes, unless an express agreement appears vesting the beneficial as well as the legal interest in the grantee or grantees in the deed. Smith *v.* Smith, 5 Ves. 189; Hunt *v.* Benson, 2 Humph. 459.

(*m*) Smith *v.* Smith, 5 Ves. 189; Hunt *v.* Benson, 2 Humph. 459.

(*n*) Marvin *v.* Trumbull, Wright, 386; Owens *v.* Collins, 23 Ala. 837; Wheatley *v.* Calhoun, 12 Leigh, 264.

(*o*) See Fall River Whaling Co. *v.* Borden, 10 Cush. 458. For cases where land was bought for special purposes, see, where the estate was bought for the purpose of supplying earth under a contract, Moreau *v.* Saffarans, 3 Sneed, 595; to build a furnace on, Ridgway's Appeal, 15 Penn. St. 177; for glass works, McDermot *v.* Laurence, 7 S. & R. 438; to build a hotel on, Brownlee *v.* Allen, 21 Mo. 123; for stores for merchants, Dyer *v.* Clark, 5 Metc. 562; for other purposes, Mattock *v.* Mattock, 5 Ind. 403; Roberts *v.* McCarty, 9 id. 16; Evans *v.* Gibson, 29 Mo. 223; Green *v.* Green, 1 Ohio, 244; Buckley *v.* Buckley, 11 Barb. 43; public-houses and lands bought by brewers, Phillips *v.* Phillips, 1 Mylne & K. 649; Morris *v.* Barrett, 3 Younge & J. 384. [If necessary, and so far as is necessary, real estate purchased with partnership funds for partnership business will be treated as personalty. Hiscock *v.* Philips, 49 N. Y. 97; Pearce *v.* Covert, 39 Wis. 252; Scruggs *v.* Blair, 44 Miss. 406; Heartt *v.* Rankin, 41 Iowa, 35; Shearer *v.* Shearer, 98 Mass. 107; Drewry *v.* Montgomery, 28 Ark. 256; Little *v.* Snedecor, 52 Ala. 167; Bank of Louisville *v.* Hale, 8 Bush. (Ky.), 672; Manck *v.* Manck, 54 Ill. 281; King *v.* Weeks, 70 N. C. 372; Lime Rock Bank *v.* Phetteplace, 8 R. I. 56; Nat. Bank *v.* Sprague, 20 N. J. Eq. 13. Real estate will be treated as partnership property, though situated in a State where by statute provision it is not. Tillotson *v.* Tillotson, 34 Conn. 335. A mill belonging to one partner, and credited to him in the partnership accounts at a certain value, becomes partnership property; and any rise in its value becomes partnership assets. Ashton *v.* Robinson, L. R. 20 Eq. 25. See also Waterer *v.* Waterer, L. R. 15 Eq. 402; Hogle *v.* Lowe, 5 Reptr. 118. If the real estate be not purchased for the partnership business, though purchased with the partnership funds, it will be held by the respective partners as tenants in common. Russell *v.* Miller, 26 Mich. 1; Price *v.* Hicks, 12 Fla. 365.

Indeed, it might be said, that even if real estate be *purchased for, used for, and paid for by the firm, it may still be shown not to be partnership property. This is not impossible; but the strongest proof would be required of a thing in its nature so improbable. *366

This is one of those questions which must be determined altogether from the intention of the parties. It is impossible for a partnership, as such, to hold the legal title of real estate. Only a person can do this; and a corporation, only because it is a person in law; but this a partnership is not. On the other hand, a partnership may own, in equity, real estate, without the least reference to the legal title, it being of no importance who holds it or how he came by it, excepting so far as these facts express or reveal the intention of the partnership. (*p*) If by that intention the property is treated by them and considered by them as partnership property, whether the intention be expressly declared and agreed by the partners, or only inferred from circumstances which do not admit of any other equally reasonable and satisfactory explanation, then it will be treated as partnership property.

SECTION III.

HOW COURTS OF LAW TREAT THE REAL ESTATE OF A PARTNERSHIP.

In some of our States, courts of law sit also as courts of equity; in some they are authorized to some extent to apply

Nor is real estate not purchased with partnership funds, though used for partnership purposes, partnership property, unless there is evidence beyond the use, under an agreement, that there is an intention to make it partnership property. Alexander *v.* Kimbro, 49 Miss. 529; Frank *v.* Branch, 16 Conn. 261, 1 Am. L. C. (5th ed.) 605. When two tenants in common own land, and carry on a partnership business which is ancillary to the land, — quarrying stone, for instance, — the land still remains realty. Steward *v.* Blakeway, L. R. 4 Ch. Ap. 603.]

(*p*) In Markham *v.* Merritt, 7 How. (Miss.) 487, it was said *obiter* by Sharkey, C. J., that taking a deed as tenants in common might be *held* a partition of the joint fund; but see, per Story, J., in Hoxie *v.* Carr, 1 Sumner, 188, that that circumstance was as evidence of intention, *per se*, very slight, and never decisive. See Wilson *v.* Hunter, 14 Wis. 683; where one of the partners who had not the legal title mortgaged land, and it was *held* good against subsequent mortgagees, with notice. And see Howell *v.* Howell, 15 Wis. 55.

the rules of equity, while sitting as courts of law; and
* 367 in some they have, * from a kind of necessity, taken to themselves this power, and applied equity principles to such questions as those we have to consider. At the same time, the distinction is obvious and certain between the principles of law and their operation, and the principles of equity and their operation. And this distinction in some form or other is usually preserved, even by courts that administer both principles. We shall speak of them as entirely distinct.

In England, the legal title to real estate in respect to transfer and conveyance is entirely distinct from that of personal estate. In respect to inheritance, it is also different, both in form and in substance; in respect to devises, it is different, but less so, practically, than in reference to the other two. In this country, the law of real estate is even more distinct from that of personal than in England, in respect to conveyance, owing to our excellent and universal system of record: but, in regard to inheritance, the difference is formal only; the same persons, in nearly all instances, taking realty who would take personalty, though by a different title and process. (*q*)

We should infer, therefore, that here as well as there the law would pay the utmost regard to title by deed and record. And this is always so. Thus, no partner or partners can convey any interest or title in or to real estate, not held of record in their names, although it is partnership property beyond all question. (*r*) And in all actions at law, no person can appear and rest upon his title, as plaintiff or defendant, if the title by deed on which he rests is in some one else. (*s*) And this is

(*q*) In Davis *v.* Christian, 15 Gratt. 11, a bill was filed for a share accrued to the complainant as husband of the daughter of a partner deceased, and one question was, whether she took such share as real or personal property; and so whether the complainant acquired the property absolutely as personal, or only a life-interest therein, as tenant by curtesy: and it was *held*, that the conversion of real property into personal was equitable only; but the precise question was not definitely decided. Per Sharkey, C. J., in Markham *v.* Merritt, 7 How. (Miss.) 437. See Bradbury *v.* Barnes, 19 Cal. 120, as to the right of one partner to buy another's interest in the real estate of the partnership.

(*r*) Jackson *v.* Stanford, 19 Ga. 14, where one partner, holding under a conveyance to the partners by their individual names, attempted to convey the whole property, and the conveyance was *held* valid, only as to his moiety. See Whitman *v.* Boston & Maine R. R., 3 Allen, 133.

(*s*) Story, J., in Hoxie *v.* Carr, 1

true of title by inheritance also. We apprehend that some of our courts might find a way to dispose of this * title * 368 at law, as it would be done in equity; but it would be difficult to do this, and, wherever equity powers could be exercised, it would be unnecessary. We should say, therefore, that at law the real estate of a partnership would pass to the legal heir by inheritance; that is, to the legal heir or heirs of him or them in whom was the legal title: (*t*) and that it would also pass by devise of the legal holder, although here courts of law might perhaps take a wider liberty than in the case of inheritance.

In like manner the peremptory provisions of the Statute of Frauds would apply; and even equity would feel itself obliged to pay some regard to them. Hence, if a partnership were formed even to trade in lands, and for nothing else, the lands when bought must not only have an owner by legal title, and pass solely from him and solely by a legal title, but all contracts and agreements between the partners themselves, as well as between them and strangers, for the sale of "lands, tenements, and hereditaments, or any interest in or concerning them," should be written and signed. (*u*) But on this there are conflicting views, which we shall consider in the next section.

Hence, too, at law, the general rule, as to the rights and liabilities of dormant partners, is said not to apply to partnerships for the purchase and sale of land. Thus, if two are partners for such a purpose, one of whom is silent and unknown, and the other, in whose name the lands are taken and transferred, alone becomes indebted for the price, it is said that the secret partner cannot be sued for the price, on proof of his partnership, and that the purchase was made and the debt incurred for the partnership. (*v*)

Sumner, 173, 177, 178; Benfield *v.* Solomons, 9 Ves. 76; Harris *v.* Pollard, 3 P. Wms. 348.

(*t*) Pugh *v.* Currie, 5 Ala. 446; Lang *v.* Waring, 25 id. 625; Dyer *v.* Clark, 5 Metc. 562; Burnside *v.* Merrick, 4 Metc. 537; Dilworth *v.* Mayfield, 36 Miss. 40; Andrews *v.* Brown, 21 Ala. 437; Davis *v.* Christian, 15 Gratt. 11.

(*u*) Per Tucker, J., in Wheatley *v.* Calhoun, 12 Leigh, 264; Sergeant, J., in Hale *v.* Henrie, 2 Watts, 145, 147; Gray *v.* Palmer, 9 Cal. 616; Patterson *v.* Grace, 10 Ala. 444; Black *v.* Black, 15 Ga. 445. And see Darby *v.* Darby, 3 Drewry, 495. The case of Smith *v.* Burnham, 3 Sumn. 435, seems, from the remarks of Story, J., to support the same doctrine; though the decision was against the complainant, no satisfactory proof of a partnership, even by parol, being made out. See *ante*, p. * 7.

(*v*) Pitts *v.* Waugh, 4 Mass. 424;

But we have some doubt whether these decisions do not rest upon a recognition of a difference between land and personalty which would not now be made. The reasons which compel courts of law to regard the legal title to land by deed do not apply, or certainly not with the same force, to courts of
* 369 equity. Nor do we * know any among the reasons which are held sufficient in such a case to bind a secret partner when discovered, in an ordinary case of partnership, which do not apply quite as well to a case where land was a part of the partnership property. (*w*)

From the regard which is necessarily paid to the legal title, it follows, as we have said, that no partner can convey any real estate, or any interest in it, but he in whose name it stands. Even equity cannot dispense with this rule. By the American law and practice all title to land must be traced along an unbroken chain of record. At every step, it must be legal title; passing, by legal conveyance, from him who has it to one capable of taking it.

SECTION IV.

HOW THE REAL ESTATE OF A PARTNERSHIP IS TREATED IN EQUITY.

1. *How far it is Regarded as Personal Estate.*

On this point, the conflict of authorities renders it difficult to lay down a positive and certain rule. We think, however, that there is a difference between the practice of the English equity courts and our own; and this difference can be defined and explained, and the decided tendency, if not the established rule, of the courts of each country, be ascertained.

The older authorities in England are opposed to any recog-

cited and followed in Gray *v.* Palmer, 9 Cal. 616.

(*w*) Though the case of Pitts *v.* Waugh is usually considered sound, as being merely at law, — see Fall River Whaling Co. *v.* Borden, 10 Cush. 485, — yet, so far as it was rested by the court on the ground of an impossibility to have a partnership dealing in land, — such partnerships being now universally admitted at common law — it must be considered overruled by the current of later authority; and the rule, that a dormant or secret partner of a land company cannot be charged, would seem now to rest upon feeble reasons. In Thorn *v.* Thorn, 11 Iowa, 146, it was held that the Statute of Frauds did not apply to land held in partnership.

nition of real property as a part of the partnership stock, and the later have yielded to the pressing necessity for this acknowledgment, slowly and imperfectly. It was not until quite recently that it has been full and complete; and now it is carried further in England than it is here. We suppose the rule of those courts to be well expressed thus: "All property, whatever be its nature, * purchased with part- * 370 nership capital for the purposes of partnership trade, is and continues to be partnership capital, and has, to every intent, the quality of personal estate." (*x*) These last two clauses are, it will be noticed, quite distinct. It is one thing to say that such real estate shall be considered, in every respect, partnership property, and another thing to add that it has to every intent the quality of personal estate. It is the first thing only, we suppose, which the American courts say; and the English courts say that, and then add the latter.

There are two reasons for this English rule. One is, that the reluctance to admit real estate as by any possibility part of the partnership capital arose from the feeling that only personal property could be thus held; and therefore, when it became obvious that real estate must be acknowledged as part of the partnership property, it seemed as if this was in fact calling it personal property. The other reason is more substantial, and probably more operative. The law of inheritance is such, in England, that where a partner intended that his real estate should be partnership stock, and so treated in all respects, injustice would be done by treating it so until the partnership account was settled and terminated, and then

(*x*) Mr. Bisset, in his treatise on the Law of Partnership, after a review of all the cases up to his time (1847), concludes, among other things, that "real estate, purchased with partnership property, but not for partnership purposes, is not converted into personalty; and that, though partners purchase with partnership funds the equity of redemption of mortgages devised to them, the equity of redemption follows the mortgage, and does not become partnership property." But the cases of Randall *v.* Randall, 7 Sim. 271, and Cookson *v.* Cookson, 8 Sim. 529, from which these conclusions were drawn, would seem to be overruled by Essex *v.* Essex, 20 Beav. 442, and Darby *v.* Darby, 3 Drewry, 495. See Bell *v.* Phyn, 7 Ves. 453, and Ripley *v.* Waterworth, id. 425. In the latter case, the whole law on this point was elaborately considered, and the Vice-Chancellor *held*, after reviewing all the authorities, that all real estate which was added to the partnership stock, in whatever way acquired, becomes converted absolutely into personal property. See Bonner *v.* Campbell, 48 Penn. St. 286.

restoring to it its character of real estate. For then the heir would take it, and all the next of kin would lose it: one child would take all, and the rest none. If the father had sold the land, and put the money into trade, all would have shared it. And if he had put his land into trade, and it must be considered that he in this way made it personal estate so far as his partners and the creditors of the firm were concerned, it would seem reasonable that he should be considered as having intended to impart to the real estate the character of personalty in all respects, and just to carry this * intention into effect. (*y*) Hence, it seems to be the English rule, and is so stated in American cases which refer to it, that the real estate of a partnership does not go to the heir of a deceased partner or partners beneficially interested in it, but to his personal representatives. (*z*) The following distinction might possibly be taken: Supposing three partners, one of whom has the legal title to real estate which is partnership property, and he dies. His heir would be held as trustee for two-thirds of it (one-third to each partner), but the other third he would hold as his own. Whereas, in the same case, if one of the other partners who was thus beneficially, but not by legal title, interested in one-third, had died, the partner holding the title, or his heir, would be held as trustee, not for the heir of that deceased partner, who had only an equitable title, but for his personal representatives. We apprehend, however, that such a distinction would be regarded as theoretical only, if admitted at all; and that the English rule, for the reasons we have stated, would give to such real estate the character and qualities of personal property, as to all persons and under all circumstances.

* 371

(*y*) See per Sharkey, C. J., in Markham *v.* Merritt, 7 How. (Miss.) 437.

(*z*) This is the conclusion of Walworth, Ch., in Buchan *v.* Sumner, 2 Barb. Ch. 199, 200; of Story, J., in Hoxie *v.* Carr, 1 Sumn. 173, 184; and Shaw, C. J., in Dyer *v.* Clark, 5 Metc. 562, 578; and though this was questioned in Buckley *v.* Buckley, 11 Barb. 73–76, yet that was before the more recent cases of Essex *v.* Essex, and Darby *v.* Darby, overruling the cases which gave rise to the doubt. See *ante*, p. * 370, note (*x*); [Callumb *v.* Read, 24 N. Y. 505.] So see the same conclusion in Duhring *v.* Duhring, 20 Mo. 174. Compare, with these English cases, the recent case of Steward *v.* Blakeway, Law Rep. 6 Eq. Cas. 479. [The land still remaining after the settlement of the partnership affairs becomes realty. Foster's Appeal, 74 Penn. St. 341.]

In this country, the rule is otherwise. Neither of the reasons above stated apply to us. There is not, and we know no reason why there should be, any reluctance to recognize as partnership property any real estate which the owners wish should be so considered. And when it has fulfilled all its functions as personal property, in respect of the partnership, the partners, and the creditors, and is no longer wanted for these, it may now become, in their hands who have the legal title, real estate, and subject to all incidents as such; because the same persons with us take the personalty and inherit the realty, and it will be much simpler and easier for them to take at once as realty that which is realty. The following, then, is the American rule: Real estate, purchased and held as partnership property, is so treated in equity, and subjected to all the incidents of partnership property. If there be death,
* the surviving partner, whether he hold the whole title, * 372
or hold it in part, or hold none of it, if he be a creditor of the partnership, has the same rights against the real estate, and only the same, which any other creditor has. (*a*) But this real estate goes to pay the debts of the partnership, and only after they are paid does it, or what is left of it, become the property of the partners, or their representatives, free from all claims; and then it is divided between them just as so much money capital would be. But it then becomes at once real estate; or, rather, all the incidents and qualities of real estate revive. This rule goes upon the ground of a trust imposed upon all who hold the legal title, in behalf of all partnership objects; and, that trust once discharged, the residue resumes its former character. (*b*)

(*a*) Delaney *v.* Hutcheson, 2 Rand. 183; Gray *v.* Palmer, 9 Cal. 616; Roberts *v.* McCarty, 9 Ind. 16. Abbott's Appeal, 50 Penn. St. 234. [In Pennsylvania, if the partners take a deed of real estate as tenants in common, this fixes the character of the property as to creditors; and, in distribution, private and partnership creditors are paid *pari passu*. Appeal of Second Nat. Bank, 83 Penn. St. 203. See also Ebbert's Appeal, 70 Penn. St. 79.]

(*b*) Dyer *v.* Clark, 5 Metc. 562; Burnside *v.* Merrick, 4 Metc. 537; Howard *v.* Priest, 5 id. 582; Peck *v.* Fisher, 7 Cush. 386; Rice *v.* Barnard, 20 Vt. 479; Goodburn *v.* Stevens, 5 Gill, 1; Galbraith *v.* Gedge, 16 B. Mon. 631; Buckley *v.* Buckley, 11 Barb. 43; Holland *v.* Fuller, 13 Ind. 195, 199; Mattock *v.* Mattock, 5 id. 403; Buchan *v.* Sumner, 2 Barb. Ch. 165; Boyers *v.* Elliott, 7 Humph. 204; Tillinghast *v.* Champlin, 4 R. I. 173; Lancaster Bank *v.* Myley, 12 Penn.

2. *Of Dower in such Real Estate.*

The English rule would seem to cut this off. (*c*) * 373 But in this * country it is quite well settled that while dower yields to the claims of partnership creditors, whether they are of the firm or strangers, and therefore cannot be granted until all the partnership debts are paid or secured, yet, when this is accomplished, as the land is treated in the same way as if it had never entered into partnership property, dower revives. (*d*) But the widow should be made a

St. 544; Sumner *v.* Hampson, 8 Ohio, 358; Greene *v.* Greene, 1 Ohio, 244; Coster *v.* Clarke, 3 Edw. Ch. 428; Lang *v.* Waring, 25 Ala. 625; Jones *v.* Neale, 2 Patton & H. 339; Hanff *v.* Howard, 3 Jones Eq. 440; Collins *v.* Warren, 29 Mo. 236; Wesson *v.* Washburn Iron Co., 13 Allen, 95; Shearer *v.* Shearer (2 Browne), 98 Mass. 107; [Kleine *v.* Shanks, U. S. C. Ct. Miss. 1876, 3 Cen. L. J. 799; Foster *v.* Barnes, 81 Penn. St. 377; Pierce *v.* Covert, 39 Wis. 252.] But, in Pierce *v.* Trigg, 10 Leigh, 406, it was *held*, by Tucker, J., that the purchase of real property with partnership funds and for partnership purposes, converted it absolutely into personalty. The court say: "It ought to replace the fund withdrawn from the personal estate. By placing it as stock in the partnership, the deceased evinced a design to treat it as personalty, and it ought to go accordingly. The representatives of the deceased can claim it only as stock; and as stock in trade it is, *ex vi termini*, personal. And, accordingly, the widow's dower was denied to her thereout, although the partnership was solvent." The court were not unanimous in this opinion. No other American decision has, it is believed, maintained this doctrine; and the later cases in Virginia, Davis *v.* Christian, 15 Gratt. 11, and Jones *v.* Neale, 2 Patton & H. 339, treat the point as doubtful, a decision thereon being unnecessary. See *ante*, p. * 367, note (*q*). On the other hand, *dicta* occur going to sustain an absolute conversion in the case of a purchase of land, under a stipulation for resale, made either at the time, or agreed upon in the partnership articles. Ludlow *v.* Cooper, 4 Ohio St. 1; Buck *v.* Winn, 11 B. Mon. 320; Divine *v.* Mitchum, 4 id. 488; Galbraith *v.* Gedge, 16 id. 631, 635; Thayer *v.* Lane, Walk. Ch. 200; but in none of these cases is the point decided. See Dewey *v.* Dewey, 35 Vt. 555. As to what joinder of interest is necessary to make a partnership in lands, see White *v.* Fitzgerald, 19 Wis. 480.

(*c*) Houghton *v.* Houghton, 11 Sim. 491; Morris *v.* Kearsley, 2 Younge & C. 139.

(*d*) Dyer *v.* Clark, 5 Metc. 562; Howard *v.* Priest, 5 Metc. 582; Coster *v.* Clarke, 3 Edw. Ch. 238; Galbraith *v.* Gedge, 16 B. Mon. 631; Goodburn *v.* Stevens, 5 Gill, 1; Smith *v.* Jackson, 2 Edw. Ch. 28. Thus, if the firm become insolvent, the widow loses dower. Greene *v.* Greene, 1 Ohio, 244; Duhring *v.* Duhring, 20 Mo. 174. [There is no dower in the real estate of a partnership, till the adjustment of partnership accounts; and any sale, whether by mortgage, or on execution, or by decree of court, will bar dower. Simpson *v.* Leach, Sup. Ct. Ill., June, 1878, 6 Cent. L. J. 135; Uhler *v.* Semple, 20 N. J. Eq. 288; Willett *v.* Brown, Sup. Ct. Mo. 3 L. & Eq. Reptr. 728.] On the other hand, if the property passes out of the partnership to a stranger, as he is not privy to the

party to any bill for an account or for a sale of the real property to pay debts. (*e*) Otherwise, the purchaser might be liable to the widow's claim for dower. (*f*)

3. *Of the Inheritance of such Real Estate.*

The heir always takes the real estate in order to support the legal title, and is then held as trustee for all those purposes to which the land must be devoted in order to make it effectually partnership property; (*g*) having, however, the right to require that the real property shall not be sold to pay debts until all the personal property is exhausted. (*h*) When these are all fulfilled, he then holds * it discharged from claim, * 374 precisely as if it had never been otherwise. (*i*) If land be conveyed to partners, in fact as partnership property, but in form to them as tenants in common, and one dies, his heir becomes tenant in common with the other partners. (*j*) Here, as before, he holds as trustee for the partnership until this trust is discharged, and then for himself. And it is said in England, that, in such a case, if the heir has a beneficial as well as legal interest, dower would be allowed. (*k*) Here it certainly would be as soon as the estate were cleared from all liability for the debts of the partnership.

trust, but holds the estate discharged thereof, the widow can claim dower of the vendee, as the holder of the legal estate; nor can he avail himself of the fact that the land was partnership property, as the trust is wholly gone. Markham *v.* Merritt, 7 How. (Miss.) 437. In Tennessee, it is *held*, that, in consequence of the act abolishing joint tenancy, Stat. 1784, ch. 22, land of the partnership, bought with its funds and used for its purposes, unless within the exception in favor of "useful trade," &c., will have every attribute of real property, and descend to the heir, and not go to the personal representatives. McAllister *v.* Montgomery, 3 Hayw. 94; Yeatman *v.* Woods, 6 Yerg. 20; Piper *v.* Smith, 1 Head, 93. In Virginia, on the other hand, it was *held*, in Pierce *v.* Trigg, 10 Leigh, 406, that real estate which became stock was entirely converted into personalty, and the widow could take no dower. But this decision seems questioned in Davis *v.* Christian, 15 Gratt. 11.

(*e*) Pugh *v.* Currie, 5 Ala. 446.

(*f*) Thus, in Collins *v.* Warren, 29 Mo. 236, as this was not done, the survivor was not allowed to recover from the widow, in an action of ejectment, more than an undivided moiety of the real estate.

(*g*) See *ante*, p. *363, note (*c*); p. *368, note (*t*).

(*h*) Lang *v.* Waring, 25 Ala. 625. So the heirs must be parties when a sale is sought for payment of firm debts. Pugh *v.* Currie, 5 Ala. 446; Lang *v.* Waring, 25 id. 625; Andrews *v.* Brown, 21 id. 437.

(*i*) Dyer *v.* Clark, 5 Mete. 562. See also preceding note, and cases cited.

(*j*) See preceding notes.

(*k*) See *ante*, notes (*h*), (*i*).

If lands are conveyed to partners in fact as partnership property, but in form as joint tenants, equity will not permit any survivorship, but will treat it as if the grantees had held it as tenants in common. (*l*)

There seems to be some disposition in England to make some distinction between lands bought by partnership funds for partnership purposes, and those which are *devised* to partners for the same purpose. (*m*) We doubt, however, whether it would be carried out and fully applied in England. If a father, for example, having two sons who were partners, devised to them lands either as tenants in common or as joint tenants, but certainly as partners and for partnership purposes, we think equity would use the legal title for partnership purposes in the same manner as if it had been bought by the partners and paid for by money bequeathed to them. We are quite confident such would be the rule in this country. (*n*)

* 375 * It has been held in England, where mortgages were devised to partners, and they bought the equities of redemption, thus completing title in themselves, the land was not partnership property, nor to be treated as personal property. The case was perhaps well decided on its facts. (*o*) But we believe no rule exists in England, and certainly none in this country, that real estate so acquired should not be considered partnership property, if it was intended so to be, and was so treated, by the parties interested.

(*l*) This equitable interference is more usual in England than in this country, Broom *v.* Broom, 3 Mylne & K. 443; Morris *v.* Kearsley, 2 Younge & C. 139; Houghton *v.* Houghton, 11 Sim. 491; Fereday *v.* Wightwick, 1 Russ. & M. 45; as the statutes of most of the United States have changed joint tenancies into what are practically tenancies in common, by abolishing the right of survivorship. See 1 Washburn on Real Property, 408, where the several State statutes are referred to at length. The American courts generally have declared the same equitable rule. Delaney *v.* Hutcheson, 2 Rand. 183; Thayer *v.* Lane, Walk. Ch. 200; Dyer *v.* Clark, 5 Metc. 562; Sumner *v.* Hampson, 8 Ohio, 328; Duhring *v.* Duhring, 20 Mo. 174; Evans *v.* Gibson, 29 id. 236; Carlisle *v.* Mulhern, 19 id. 56.

(*m*) Phillips *v.* Phillips, as stated in Bisset on Part. 50.

(*n*) Dyer *v.* Clark, 5 Metc. 562; Burnside *v.* Merrick, 4 id. 537; Howard *v.* Priest, 5 id. 582.

(*o*) Phillips *v.* Phillips, Bisset on Part. 50. This case has not been questioned in any decision that we are aware of, and is recognized by Mr. Lindley, Law of Part. pp. 553, 554, though, it seems, with some hesitation; and it is certainly against the broad rules given by him as the result of the English authorities.

4. *Of the Right of Creditors of the firm to its Real Estate.*

This right whenever it arises, as will be inferred from what has been said, is the same as it is to the personal estate of the partnership. But it must be worked out by the power of equity to hold the legal owner as trustee for those who are beneficially interested. A question of some importance, at least in this country, arises, as to when the creditors' right to real estate may be enforced. It is this: Have the creditors of a firm, in equity, under all circumstances the same right to the real estate that they have to the personal estate of the firm; or have they only a right to resort to the real estate if the personal estate prove to be insufficient to pay the debts? The difference might be a very important one in this country, so far at least as dower is concerned. It might, indeed, be for the interest of the heir to have the land of a partnership appropriated in the first place to pay the debts. If the firm were insolvent, it would make no difference. (*p*) If not, the heirs would lose the land, but would save from the surplus of personal just as much as they would lose in the land, and would take it free from the encumbrance of dower. But, in such a case, a court of equity applied a similar rule to that which obtains in the settlement of an estate of a deceased person. (*q*) The personal * estate is applied to * 376 the payment of debts in the first place; if that be exhausted and insufficient, then so much of the real estate is so applied as may be necessary. And so it is in case of partnership; and therefore the whole real estate of a partnership, if none of it were wanted for payment of debts or partners'

(*p*) But see, in Lang *v.* Waring, 25 Ala. 625, that the heirs are not cut off from all defence, even by insolvency of the firm. [Where a partner mortgages partnership real estate to secure his individual debts, the partnership creditors must first be paid before the private creditors can take the property, or any part of it, by foreclosure. Conant *v.* Frary, 49 Ind. 530.]

(*q*) The doctrine of marshalling assets will always be applied in cases where the aid of equity is claimed to reach a fund, by one who has recourse to two funds in the same right; that is, the creditor will be compelled to resort to that fund which he alone has recourse to, and exhaust it, before he can subject the other to his demand. Adams' Eq. 271, 274, and cases cited; Bardwell *v.* Perry, 19 Vt. 292; and, generally, cases cited *ante*, p. * 353, note (*u*).

shares, would be as unaffected in equity as at law; and, if part of it were so wanted, that part only would be treated as personal property, leaving the residue untouched. (*r*)

5. *Of the Right and Power of the Partners as to the Real Estate of the Partnership.*

This seems to be, in equity, entire and complete, so far as the payment of debt goes; and, after that payment, so far as the adjustment of the mutual claims or balances of the partners is concerned. (*s*) But there is a limitation as to the power of a partner over this real estate, which would, we think, be applied in this country as it is in England. It is simply this: No partner, and no proportion of the partners, can sell or transfer the real estate of the firm — outright for money, or by way of mortgage to secure a debt, or to assignees in trust for debts — without the consent and authority of the other partners.

* 377 On the first point, — that he * who happens to have the legal title cannot sell the real estate without the consent and authority of the rest, so as to give title to a grantee having notice, — we are quite sure that must be the law. And if he make a mortgage to secure a debt, or an assignment in trust for creditors, by which the legal title would pass, it seems that equity will not sustain the transaction, even supposing it free

(*r*) In case of dissolution by the death of a partner holding title to the firm's real estate, neither the survivor nor the partnership creditors can claim the aid of a court of equity to compel the widow and heirs to release their rights, until the personal assets are exhausted. Lang *v.* Waring, 25 Ala. 625, correcting Andrews *v.* Brown, 21 id. 437. As to the right of partnership creditors, when the real assets are requisite to a full satisfaction of their debts, to call upon the heirs and widow to convey and release their rights, through the medium of assent to a sale by the survivor, see Sumner *v.* Hampson, 8 Ohio, 328; Lang *v.* Waring, *supra:* Pugh *v.* Currie, 5 Ala. 446; Davis *v.* Christian, 15 Gratt. 11; Duhring *v.* Duhring, 20 Mo. 174; Carlisle *v.* Mulhern, 19 id. 56; Richardson *v.* Wyatt, 2 Desaus. 471; Dillon *v.* Brown, 11 Gray, 179. In the cases where an apparent right has been given to the survivor to call upon the heir peremptorily to convey, it will always, we think, be found that the land was needed to pay the debts of the firm. Pugh *v.* Currie, 5 Ala. 446; Sumner *v.* Hampson, 8 Ohio, 328. And the case of Andrews *v.* Brown, 21 Ala. 437, which seemed to disregard this rule, was overruled on this point by Lang *v.* Waring, 25 id. 625.

(*s*) Dilworth *v.* Mayfield, 36 Mo. 40; Andrews *v.* Brown, 21 Ala. 437; Lang *v.* Waring, 25 id. 625; Pugh *v.* Currie, 5 id. 446; Davis *v.* Christian, 15 Gratt. 11; Shearer *v.* Paine, 12 Allen, 289.

from the taint of fraud. (*t*) It would seem, therefore, that the power of a partner over the real estate of the firm is less than that over the personal estate. He may contract debts and make contracts which will indirectly reach the realty, because this must finally be subject to the debts of the firm. But he cannot directly convey or appropriate it, excepting so far as he has the legal title in himself; and then a purchaser with knowledge, or the means of knowledge, takes the land subject to all the equities of the partners. (*u*) And, by the same principle, it is *held*, in England, that the contracts of a partner about the land of the firm — as for its sale, for example — have no force, unless they are made with the consent and by the authority of the firm. If this were shown, however, although not in such a way as to give any interest or right or remedy at law, equity would undoubtedly enforce the contract, if it were itself legal.

A different question arises when a partner does not undertake to dispose of the property or interest of the firm in the real estate, but sells his own interest in it to a stranger. This it has been held he may do, and that the sale is valid as against his copartners, although it would not be valid as against the creditors of the firm. (*uu*)

A sale of partnership real estate by order of court, to pay the debts of a deceased partner, conveys only his interest as partner, although the whole legal title was in the deceased. (*uuu*)

SECTION V.

OF CONVEYANCES TO STRANGERS OF THE REAL ESTATE OF THE PARTNERSHIP.

We have repeatedly remarked that the law respects and upholds the legal title to land by deed and record. Nor will equity disregard or supersede this in relation to innocent purchasers. Thus, if land which certainly belongs to a partnership is held in the name of one partner, and he conveys it for

(*t*) Hanff *v.* Howard, 3 Jones Eq. 440; Baldwin *v.* Johnson, Saxt. Ch. 441.

(*u*) Forde *v.* Herron, 4 Munf. 316; per Walworth, Chancellor, in Buchan *v.* Sumner, 2 Barb. Ch. 175, 198.

(*uu*) Treadwell *v.* Williams, 9 Bosw. 649.

(*uuu*) M'Cormick's Appeal, 57 Penn. St. 54.

value to a person who has no knowledge, or reasonable means of knowledge, that it belongs to the firm, such person, we have seen, will hold it as against the firm. Of this there can
* 378 be no doubt, and as little that * if the grantee knew, or had sufficient means of knowing, that it belonged to the firm, his title will be annulled, or he will be charged as trustee for the firm. (*v*) It is a much more difficult question, whether such innocent purchaser holds the property as against creditors. In the absence of decisive authority, we should say, on general principles, that he would. If a partner sells a part of the merchandise of his firm, fraudulently against the firm or its creditors, but apparently in due course of business, so as to excite no suspicion, and give no notice to the purchaser, we should say that the purchaser would hold it both as against the firm and their creditors. On similar grounds, we should say that a regular transfer of land, for value, to an innocent stranger would give him title against the firm and the creditors of the firm, although the firm were insolvent, and the sale fraudulent on the part of the partner selling.

(*v*) M'Dermot *v.* Laurence, 7 S. & R. 438; Forde *v.* Herron, 4 Munf. 316; Walworth, Chancellor, Buchan *v.* Sumner, 2 Barb. Ch. 198; Tillinghast *v.* Champlin, 4 R. I. 173, 209; per Shaw, C. J., in Dyer *v.* Clark, 5 Metc. 562, 580. In some cases in Pennsylvania, a different doctrine prevails. In the earliest case, M'Dermot *v.* Laurence, Tilghman, C. J., carefully guarded against the case where the purchaser had reasonable means of knowledge; but in Hale *v.* Henrie, 2 Watts, 145, the court, Gibson, C. J., absolutely excluded evidence showing a clear knowledge of the partnership equities, holding that the purchaser need only rely on the registered title; and his decision was sustained by the court in bank. In the later cases of Kramer *v.* Arthurs, 7 Penn. St. 165, and Ridgway's Appeal, 15 id. 177, the same doctrine was recognized. But see Moderwell *v.* Mullison, 21 id. 257, Coder *v.* Huling, 27 id. 84, where this doctrine seems somewhat qualified. Where, as is generally the case, the purchaser is a creditor of one partner, it seems *held*, that he will be postponed to the demands of the partnership, — both creditors' and partners' claims — notwithstanding the recorded title. Edgar *v.* Donnally, 2 Munf. 387; Jarvis *v.* Brooks, 7 Fost. 36; Hanff *v.* Howard, 3 Jones Eq. 440; Tillinghast *v.* Champlin, 4 R. I. 173.

CHAPTER XII.

OF DISSOLUTION.

SECTION I.

OF THE EXTENT AND DURATION OF A PARTNERSHIP.

When a partnership is formed, the partners may determine at their pleasure what its extent shall be in respect to business, and what in respect to time. We shall presently consider how far and in what way their agreement as to the duration of the partnership binds them. As to the scope or character of their business, supposing they do or propose to do nothing in itself unlawful, we know no limitation to their power. They may determine this when they enter into partnership, and provide for it in their articles, or at any subsequent time. And they may change their business at their own pleasure, by enlargement, contraction, or alteration.

It must be obvious, however, that any agreement of this kind, once made, is binding upon all the parties to it, and comes under the general rule of contracts, that they cannot be varied or rescinded but with the consent of those who make them. And another general rule applies; which is, that the terms of the bargain, if reduced to writing, are not to be varied by other evidence; and, if not reduced to writing, may be inferred from circumstances. This is sometimes important. A partner who violates an agreement of this kind — that is, who makes a material change in the extent or character of the business, without the consent of the other partners — commits a wrong against them, as we have already seen, for which he is responsible to them in damages, and may also be restrained or otherwise dealt with in equity. Whether such wrong has been done may be easily ascertained, if there be articles which define

the business of the partnership. If there are none,
*380 *it is more difficult. And, perhaps, it may be said that courts of law or of equity would in such case require circumstantial evidence of a certain and positive character, both as to the proper scope and character of the business, and that the change complained of is in violation of the agreement implied, in the absence of writing, from a long and distinct course of business.

A partnership, having once begun, will be presumed to continue until there is some evidence of its termination. (*a*) And, even after a dissolution, the partnership, or at least a kind of community of interest, of power, and of liability, continues, as we shall see, for some purposes, and for so long a time as is necessary to carry those purposes into effect. In general, however, we may say that a partnership ends by its dissolution. And we will now proceed to consider the subject of dissolution of partnership; and, particularly, how many ways there are in which a partnership may be dissolved, and what are the effects of each kind of dissolution.

Dissolution of partnership takes place in seven different ways: 1. By the provision of the articles. 2. By the will of all the partners. 3. By act of one or more of the partners alone. 4. By a change in the partnership. 5. By the death of a partner. 6. By decree of a court of equity. 7. By bankruptcy.

SECTION II.

OF DISSOLUTION BY A PROVISION IN THE ARTICLES.

Perhaps there is no one thing more frequently provided for by the articles than the duration of the partnership. Where this is done in a simple form, as by the mere statement that "this partnership shall continue for the period of five years from this date," there can be no question about its meaning, and none

(*a*) Howe *v.* Thayer, 17 Pick. 91. But in Rogers *v.* Reed, 18 Me. 257, the court *held*, that evidence that persons were partners ten months before the note in suit was signed, was not evidence that they were so at that time.

about its legal obligation. When that period expires, or the time for dissolution arrives, the partnership dies, of course. It may be * continued by agreement, and often is; but this * 381 is, in fact, a new partnership. And the old articles are of use only as evidence to assist in determining its terms; and they will be decisive on this point, if by the agreement the terms of the new one are to be the same with those of the old. The question often occurs, however, What can a partner do, who wishes to terminate such a partnership before the agreed period arrives? And we have already seen that there is much difficulty in determining how far the parties are bound by such agreement in practice. No doubt exists that equity may decree dissolution for cause, whatever be the agreement, or may refuse such a decree, and even enjoin a continuance of the partnership. And we shall presently see that certain acts, which would seem to be always in the power of a partner, as a transfer of his interest, or his insolvency, or retirement in any way, generally dissolve the partnership. And the question has arisen, whether equity will ever compel parties to remain in this relation, after it has become certain that there is no longer mutual confidence, or regard, or desire for continuing the connection. This question we have already touched upon; (*b*) and it is perhaps impossible to give even a general rule on the subject, unless we venture to state this to be one: That equity will not in such case, decree a continuance of the partnership because the agreed period has not expired, unless, in the first place, a decided wrong and injury would be inflicted by the present dissolution; and, secondly, it is practicable for the court to insist upon such a continuance as will in fact prevent the threatened mischief, without doing other harm. (*c*)

(*b*) See *ante*, pp. *236, 301. And see *post*, p. * 404, note (*c*).

(*c*) Chavany *v.* Van Sommer, cited 1 Swanst. 512, note, and 3 Wooddes. Lect. 416, note; Barring *v.* Dix, 1 Cox, 213; Smith *v.* Jeyes, 4 Beav. 503; Harrison *v.* Tennant, 21 id. 482; *In re* Electric Telegraph Co. of Ireland, 22 id. 471; Waters *v.* Taylor, 2 Ves. & B. 229; Skinner *v.* Dayton, 19 Johns. 538; Peacock *v.* Peacock, 16 Ves. 56; Crawshay *v.* Maule, 1 Swanst. 495; Harrison *v.* Tennant, 21 Beav. 482; Pearpoint *v.* Graham, 4 Wash. C. C. 234; Cape Sable Co.'s Case, 3 Bland, 674; Monroe *v.* Conner, 15 Me. 180; Howell *v.* Harvey, 5 Ark. 281; Beaver *v.* Lewis, 14 Ark. 138; Mann *v.* Connell, 1 Whart. 388; Whitton *v.* Smith, 1 Freem. Ch. (Miss.) 231; Blake *v.* Dorgan, 1 Greene (Iowa), 540; Garretson *v.* Weaver, 3 Edw. Ch. 385; Kennedy *v.* Kennedy, 3 Dana, 239; Gowan *v.* Jeffries, 2 Ashm. 296. As to season-

The provision in the articles on this subject may not be so simple as above suggested. It may be that the partner-
* 382 ship shall * continue until certain circumstances occur, or until one partner or the other does certain things. In such a case, there is no dissolution by the articles until the circumstances occur, or the act be done. Difficult questions of fact may arise under such a clause; but, so far as a question of law can come from it, it must be governed by the ordinary principles of contracts on a condition. (*d*)

The articles may omit all reference to the termination of the partnership; and sometimes the agreements as to the partnership are only oral, (*e*) and sometimes the partners expressly agree simply to be partners, leaving all the rest to their mutual but silent understanding, or to time and the operation of law. (*f*)

In these cases, it may be a question whether the facts and circumstances do not imply or raise a presumption of law that there was some agreement for a definite term. This question has been not unfrequently mooted, and sometimes it seems to have been decided on doubtful principles. We certainly should not deny that there may be such inferences or implications; but they should not readily be admitted.

If, for example, a partnership, needing land or a store for its business, hired one, paying the rent from partnership funds, and using it for partnership purposes, so as to leave no doubt that it is partnership property, could it be said that the lease implies an agreement that the partnership shall continue until the lease expires? We think not; and the best authorities lead to this conclusion. (*g*) As a matter of actual probability, such a lease is very slight evidence of any such intention. They may have taken it for many years, because they could not get it otherwise, and were willing to take the risk of disposing of

able time, see Wheeler *v.* Van Wart, 2 Jur. 252; Reade *v.* Bentley, 3 Kay & J. 271, 4 id. 65; Potter *v.* Gray, 1 R. I. 430. As to the grounds on which equity will decree a dissolution, see Mealier *v.* Cox, 37 Ala. 201.

(*d*) See 2 Pars. Contr. (5th ed.) 525–527.

(*e*) *Ante*, p. * 6, et seq., and notes.

(*f*) *Ante*, p. * 231.

(*g*) Crawshay *v.* Maule, 1 Swanst. 495; Featherstonhaugh *v.* Fenwick, 17 Ves. 298, 307; Alcock *v.* Taylor, Tamlyn, 506; Jefferys *v.* Smith, 1 Jac. & W. 301. See Marshall *v.* Marshall, cited 2 Bell Comm. 641, note 3, and 633, note 1.

it when they should dissolve; or they may have taken it in order to be sure, at all events, of the premises as long as they might want them. Other suppositions might be made: so many, indeed, that we think the lease while standing alone would not amount, even if wholly unexplained, to *primâ facie* evidence, either in fact or in law, of *any understanding that the partnership should last as long as the lease run. *383

So, too, if the partnership entered into long and continuing contracts of business, or engaged in some transaction which could not be closed for a considerable period without great loss, we should say, that nothing of this kind would be very strong evidence of a definite understanding or agreement for continuance. (*h*) There may be many ways of transferring or cancelling such contracts, or bringing such transactions to a close, or even of continuing them after the partnership has closed. We should admit that all circumstances of this kind might be admissible and useful evidence in connection with the general course of the business, the usage relating to it, and all those facts which, looking to the future, imply an intention in regard to it. But, so far as a general principle can be given for this class of questions, it must, we think, be this: That equity would not decide on such grounds that the partners had mutually agreed to continue as partners for a certain period; unless no other theory so well satisfied and explained all the facts of the case, and a permission to either partner to dissolve at pleasure would work great mischief. Then, perhaps, equity might prefer to decide that the parties had agreed to remain together, and therefore should not part, rather than to say that one of them should not exercise his right to dissolve the firm, because he would thereby inflict an injury. (*i*) But if one of

(*h*) Featherstonhaugh *v.* Fenwick, 17 Ves. 298, 307. But see Potter *v.* Gray, 1 R. I. 430. The mere fact that a firm has incurred debts, and charged its assets for their payment, is no evidence of an agreement that the firm shall continue until its debts are paid. See King *v.* The Accumulative Assurance Co., 3 C. B. N. S. (91 Eng. Com. L. R.) 151.

(*i*) In Wheeler *v.* Van Wart, 2 Jur. 252, the deed of settlement constituting a company contained no clause limiting the duration of the partnership; but it provided that certain persons should be appointed directors until July, 1838, or until an act of Parliament should be had. The Vice-Chancellor said: "It is my opinion that they could not dissolve until July,

58 Mich 476

several partners agrees with a stranger for a sub-partnership, it is not to be implied, merely from the absence of any agreement to the contrary, that the duration of the sub-partnership is to be coextensive with the original partnership. (*j*)

* 384 * Partnerships are sometimes formed for a single adventure or enterprise. Then, they terminate when that enterprise is brought to a close; (*k*) for the articles of agreement which limit the partnership to that adventure imply that it ceases when that ceases; but, for the purpose of winding up those affairs, it continues until all past transactions are closed. (*l*) But such a partnership may continue, by express agreement, or by the partners going on to act as partners in other transactions; and this would not be considered as a new and distinct partnership, but as a continuation of the original one, and a continuation of the original terms, unless new parties came in, or it could be shown, or inferred from circumstances, that the terms were varied.

So, too, if the partnership were formed for dealing with a subject-matter certain to expire at a certain time, or even to expire at any time, it must be understood as providing that the partnership shall then expire. As, if for traffic with a certain patent or copyright, which had a definite number of years to run. We apprehend, that, if such patent or copyright were renewed under the general law, the partnership would still continue. But, if it were renewed only by special statute or grant, a continuance of the partnership would require a new agreement. (*m*)

SECTION III.

OF DISSOLUTION BY THE WILL OF ALL THE PARTNERS.

It is obvious and certain that the contract of partnership is rescindable by all who are parties to it, at their own pleas-

1838; and, if so, then, as in an ordinary partnership, they could not do it without notice." This point is not mentioned in the report of the case in 9 Sim. 193. See Reade *v.* Bentley, 3 Kay & J. 271, 4 id. 65; Potter *v.* Gray, 1 R. I. 430.

(*j*) Frost *v.* Moulton, 21 Beav. 596.

(*k*) Pothier, Contrat de Soc. No. 140–143.

(*l*) Petrikin *v.* Collier, 1 Barr, 247.

(*m*) See Wheeler *v.* Van Wart, 9 Sim. 193, 2 Jur. 252; Reade *v.* Bentley, 4 Kay & J. 656, 3 id. 271.

ure. (*n*) But a majority of the partners may not exclude one of the partners from the firm without sufficient cause. It has been held not a sufficient cause, that he paid into the capital a part only of what he agreed to contribute, if that part had been accepted, and used in the business of the firm. (*nn*)

A technical distinction, still mentioned in our text-books, that, if the contract of copartnership is under seal, it cannot be revoked and cancelled excepting under seal, has never had any force in equity; and we do not suppose that it would now have any practical effect in law. (*o*)

*Not only would any express renunciation have this *385 effect, but a general consent of the termination of the partnership would be inferred from conduct or circumstances not otherwise explicable; as, by a tacit renunciation and stopping of business, settlement of the debts and accounts, converting of the property into money, or division of it among the partners, sale of the good-will, or the like. (*p*)

It has been questioned whether the incorporation of the partners, for a similar business, would amount to a dissolution by consent. This has not unfrequently occurred in this country, where successful manufacturers or mechanics have found their business so enlarged that it was more convenient to transact it under the forms of a corporation. We should say that this fact alone would not necessarily be the dissolution of the partnership. But it never would stand alone. The corporation would always have some defined relation to the former partnership.

(*n*) See Master *v.* Kirton, 3 Ves. 274.

(*nn*) Hartman *v.* Woehr, 3 Green (N. J.), 383.

(*o*) This point was raised in Waithman *v.* Miles, 1 Stark. 181. The partnership deed was under seal. To prove a dissolution, a written notice was put in, signed by all the parties, which stated that *they had dissolved the partnership*. Lord Ellenborough said it might be very deserving of attention, whether a partnership created by deed could be dissolved by any thing short of a deed; but here, as against the party who signed the notice, the partnership must be taken to have been dissolved by competent means. Same case not reported so fully, 4 Camp. 373. In Hutchinson *v.* Whitfield, Hayes, 78, it was provided that the partnership should be dissolved only by deed. *Held*, that an award under a submission, both under seal, dissolving the partnership, was valid. The action of covenant lies for a wrongful dissolution. Addams *v.* Tutton, 39 Penn. 447.

(*p*) For cases bearing on such questions, see Heath *v.* Sansom, 4 B. & Ad. 175; Jefferys *v.* Smith, 3 Russ. 158; Johnson *v.* Evans, 7 Man. & G. 240; Habershon *v.* Blurton, 1 De Gex & S. 121; Aspinall *v.* The London & N. W. R. Co., 11 Hare, 325; Perens *v.* Johnson, 3 Smale & G. 419.

Either it would be a substitute, taking all its business and all its property, leaving it nothing to hold, nothing to do, and nothing to be; in which case it would be clear that the partnership had died out; or else some portion of the business and the stock would be left for the firm, and some use made of it; and then it would remain for these purposes. (*q*)

SECTION IV.

OF THE GENERAL EFFECTS OF A DISSOLUTION.

1. *Of its Effect on the Interests or Rights of Partners.*

* 386 * Some general results follow a dissolution of partnership, or some general principles apply to dissolution, which are especially pertinent to dissolution by articles or by consent, and we will present them in a general form now; reserving the modifications in them caused by particular methods of dissolution, until we specially consider those methods.

In the first place, a mere dissolution has no effect whatever on the property of the partners, or their interest in the joint stock or joint rights, or their power over old or existing debts due to them or due from them; excepting always that they have all entirely lost the power of acting for each other, or binding each other, any further than all joint debtors or joint creditors may do. Thus, if we suppose a dissolution by articles or consent, and no special agreement as to the powers or acts of the several partners, each one has a perfect right to require, and through equity compel, a final settlement and adjustment of all questions and all property; (*r*) and each one has the same power as to this, and all the details connected with it, as any other. So, too, each partner has as much right to any particular thing or things as any other; and all the others have as much right as he has. (*s*)

(*q*) See Goddard *v.* Pratt, 16 Pick. 412; The Cape Sable Company's Case, 3 Bland, 674. There is no doubt that after the incorporation the members of the firm are liable for all debts previously incurred. Haslett *v.* Wotherspoon, 2 Rich. Eq. 395. But if the new corporation assumes all debts and liabilities of the old firm, and the creditors assent thereto, they cannot on the failure of the corporation hold the former members of the firm. Whitwell *v.* Warner, 20 Vt. 425.

(*r*) *Ante*, p. * 299, et seq.

(*s*) Mumford *v.* McKay, 8 Wend. 440. See Downs *v.* Jackson, 33 Ill.

Where, upon a dissolution, it was agreed that the assets of the firm should be placed in the hands of one partner, and he agreed that he would therefrom pay the debts of the partnership, it was held that he had only agreed to apply the assets to the debts, but did not absolutely assume the payment of them. (*ss*)

As all are liable for the debts, so any one may make a payment of any or all the debts, and charge such payment to the partnership, without any express authority for this. (*t*) Even if he * uses property to pay the debt in a way that * 387 is fraudulent or injurious to his former partners, and must, therefore, respond to them in account or as damages for the act; the creditor thus paid, provided he do not participate in the wrong, will hold his payment, even if he were aware of the dissolution. (*u*)

As to the debts due to the partnership, any one partner may claim and receive them for the partnership; and his receipt would be binding on the partnership, in favor of an innocent debtor. (*v*) We should apply the same principle to any method of payment. Thus, if the partner compromised the debt, allowing an enormous discount for immediate payment, with a design to abscond with the money, or otherwise defraud the other partners, we should say, as matter of law, that an

464, on the relative mutual liability of each partner for the partnership debts. And see Robbins *v.* Fuller, 24 N. Y. 570; Ward *v.* Tyler, 52 Penn. St. 393. See, on the relations and liabilities of partners after dissolution, Chapman *v.* Thomas, 4 Keyes (N. Y.), 216.

(*ss*) Topliff *v.* Jackson, 12 Gray, 565.

(*t*) Lyon *v.* Haines, 5 Man. & G. 541; Smith *v.* Winter, 4 M. & W. 461; Butchart *v.* Dresser, 10 Hare, 453, 4 De Gex, M. & G. 542. In this last case, it was said: "Each partner has, after and notwithstanding the dissolution, full authority to receive and pay money on account of the partnership, and has the same authority to deal with the property of the partnership for partnership purposes as he had during the continuance of the partnership. This must necessarily be so. If it were not, at the instant of the dissolution it would be necessary to apply to this court for a receiver in every case, although the partners did not differ on any one item in the account." And see Darling *v.* March, 22 Me. 184; Rootes *v.* Welford, 4 Munf. 215; Woodford *v.* Downer, 13 Vt. 522; Union Bank *v.* Hall, 1 Harper, 245; Wood *v.* Braddick, 1 Taunt. 104.

(*u*) See Butchart *v.* Dresser, 4 Russ. 430; Lewis *v.* Reilly, 1 Q. B. 349.

(*v*) See cases cited, *ante*, note (*t*). And see Elliott *v.* Brown, 3 Swanst. 489, n.; Hawkins *v.* Hawkins, 4 Jur. N. S. 1044; Benham *v.* Gray, 5 C. B. 138; Waithman *v.* Miles, 4 Camp. 373; Colnaghi *v.* Bluck, 8 Car. & P. 464, as to other rights of partners after dissolution.

entirely innocent debtor would still be protected, although he knew of the dissolution. (*w*) But we should also say, that, as matter of fact, any such circumstances would strongly aid the proof of dishonesty, or even raise a presumption of it. For it would certainly be a general probability, that a debtor of a partnership which he knew to be dissolved, if he found one of the partners so anxious to settle the account or anticipate payment as to consent to great sacrifices, would infer that mischief might be intended, and at least be sufficiently warned to put him upon inquiry as to the honesty and validity of the proposed transaction. But, we repeat, we should consider this a question only of fact; for the rule of law must be, that a dissolution without especial agreement leaves all the partners on equal ground, and gives to each an equal power of settlement. (*x*)

Therefore it is that such a dissolution is rare. Far more frequently, provision is made, either in the original
* 388 articles or in an * agreement at the time of dissolution, as to the manner of settlement; that is, who shall collect and pay the debts, adjust and settle the accounts, and (to use the common phrase) wind up the concern. And such an agreement certainly affects all the partners and all third parties who have notice or knowledge of it.

2. *Of Winding up the Concern.*

The general rule we take to be this: The concerns of the partnership must be wound up in some way and by some persons. The partners may provide for this at their own pleasure. If they do not provide for it, the law provides for it in the only possible way; and that is by continuing the partnership, with its incidents of interest, power, and obligation, for the purpose of thus winding up, and therefore as far as is necessary for thus

(*w*) Union Bank *v.* Hall, 1 Harper, 245. In New York, it is enacted by statute passed April 18th, 1838, ch. 257, that after the dissolution of a firm one or more of the partners may make a compromise with any creditor of the firm, which compromise shall only operate to discharge the debtor making the same. But such compromise shall not operate to prevent the other copartners from calling on the partner making the same for his ratable portion of such debt.

(*x*) See cases in previous notes.

winding up, and no further. (*y*) And this power of a former partner has been held to pass to his administrator at his death. (*yy*)

It follows that every partner has full authority to do any thing the want of which would prevent this winding up, or leave it incomplete; and that he can do nothing which is not indispensable for this purpose. We say indispensable, in exclusion of what is merely convenient, or even desirable and expedient, unless it can be considered necessary for the proper settlement of the affairs of the firm. And even a settlement by a partner after dissolution, in fraud of the firm, would be valid in favor of a third party who was wholly innocent. (*yyy*) And if the partners agree, as they generally do, that one or more of them shall wind up the business, while the others have nothing to do with it, we hold that this arrangement *confines* the power to those thus designated; but does not *enlarge* this power in them, although it takes it away from the others. It seems, however, to be well settled, that an authority given to one partner "to close all business transactions of the late firm;" (*z*) "to settle up the business of the firm;" (*a*) "to settle all demands in favor of or against the firm;" (*b*) "to settle business of the firm, and for * that purpose to use their name;" (*c*) "to settle business of the firm * 389 and sign its name for that purpose;" (*d*) "to use the name of the firm in liquidation, only of past business," (*e*) — confers no more power than the partner would have by the general principles of the law of partnership. In one case, however, the court were of the opinion that the authority given to use the partnership name conferred a greater power than would have

(*y*) *Ex parte* Williams, 11 Ves. 5; Peacock *v.* Peacock, 16 id. 57; Crawshay *v.* Collins, 15 id. 227, 2 Russ. 342; Wilson *v.* Greenwood, 1 Swanst. 480; Crawshay *v.* Maule, id. 507; Butchart *v.* Dresser, 4 DeGex, M. & G. 542; Payne *v.* Hornby, 25 Beav. 280; Chappell *v.* Allen, 38 Miss. 213; [Thursby *v.* Lidgerwood, N. Y. Ct. of App. 3 L. & Eq. Reptr. 601.]

(*yy*) Mutual Institution *v.* Euslen, 37 Mo. 453.

(*yyy*) Thrall *v.* Seward, 37 Vt. 573.

(*z*) Palmer *v.* Dodge, 4 Ohio St. 21.

(*a*) Parker *v.* Cousins, 2 Gratt. 372; Long *v.* Story, 10 Mo. 636; Martin *v.* Walton, 1 McCord, 16; Parker *v.* Macomber, 18 Pick. 505; Fellows *v.* Wyman, 33 N. H. 351.

(*b*) Lockwood *v.* Comstock, 4 McLean, 383.

(*c*) National Bank *v.* Norton, 1 Hill, 572.

(*d*) Hamilton *v.* Seaman, 1 Ind. 185.

(*e*) Martin *v.* Kirk, 2 Humph. 529.

otherwise existed, and held that it was for the jury to find, from the course of trade, and the usage and custom of merchants, as well as from the notice itself, whether this power extended to the renewal of a note which had been discounted at a bank previous to the dissolution. (*f*) When one partner takes all the assets, for the purpose of settlement, equity may require him to indemnify the other partners against the liabilities of the firm. (*ff*) If a partner, under such an authority, receives a note, in payment of a debt due to the firm, payable to bearer, it seems that the legal title to such note will vest in such partner alone; and, therefore, he will be able to give a good title to it by delivery. (*g*) The questions which refer to this rule have arisen principally where any former partner, and especially where a partner authorized by the rest to settle the concern, has issued new paper, or indeed entered into any new contract. This may be not only honest, but in the highest degree advantageous, to all concerned. Thus, a creditor may be willing to renew a note or bill, or take a note or bill for a former purchase on a credit which has expired; and, unless he can have this note or bill in the name of the firm, he insists upon all his money, which can neither be refused nor paid without disaster. It is an unquestioned principle of law, that after a dissolution the authority of a former partner to bind the others is gone, except as to the settlement of the estate of the old partnership: and it is usually stated that he has no power to make any new contracts. It is obvious, however, that a strict construction of this rule might pre-
* 390 vent the partner whose * duty it is to settle up the estate from accomplishing this object in the most judicious manner. So far as the question is still an open one, we

(*f*) Myers *v.* Huggins, 1 Strobh. 473.

(*ff*) Cook *v.* Jenkins, 35 Ga. 113.

(*g*) See the language of Shaw, C. J., in Parker *v.* Macomber, 18 Pick. 505, where the individual note of a partner, made after the dissolution of the partnership, was transferred by the holder to the firm, by an indorsement in blank, in payment of a debt, it was *held*, that such note, being payable to bearer, might be legally transferred to a third person by another partner, who was authorized to settle the concerns of the partnership. On a settlement of partnership affairs, if it is agreed that one of the partners shall collect a note and accounts, for the benefit of both, it will be presumed that the money, as fast as received, shall be divided between the parties. Metcalf *v.* Fouts, 27 Ill. 110.

should consider the true rule to be, that no contract can be made by one partner, after dissolution, by which the others will be bound, unless such contract is necessary for settling up the business of the concern in the most judicious manner.

The duty of settling partners is similar in many respects to that of trustees and agents; (*h*) and they should, in settling up the affairs of the old firm, have all the rights which agents usually have by the usages of the business in which the old firm was engaged. In the language of the Supreme Court of Maine, "The dissolution operates as a revocation of all authority for making new contracts. It does not revoke the authority to arrange, liquidate, settle, and pay those before created." (*i*) Thus, in a case where a bill of exchange was drawn in blank by one partner, to the order of the firm, and indorsed before the dissolution of the firm, it was *held* that it might after that event be filled up and negotiated. (*j*) And, after dissolution, one partner may waive demand and notice, this being considered as merely a modification of an existing liability; (*k*) he may also, it has been *held*, lawfully assign to a creditor of the firm a demand due to the partnership; (*l*) or acknowledge in the partnership name, after dissolution, a balance due from the partnership. (*m*) If a note is signed by a firm payable to the order of one of its members, this person may indorse the note after the dissolution of the firm, so as to bind it. (*n*)

In Pennsylvania, the courts have fully adopted the principle, that as to past transactions the partnership continues until they are settled. Thus, it is held that after dissolution a partner may borrow money to pay partnership debts, (*o*) and

(*h*) Washburn *v.* Goodman, 17 Pick. 519. See Wilson *v.* Stilwell, 14 Ohio, 464; Parker *v.* Phillips, 2 Cush. 175. See also Caldwell *v.* Stileman, 1 Rawle, 212; Beak *v.* Beak, 3 Swanst. 627.

(*i*) Darling *v.* March, 22 Me. 184. But the power to give a note, in renewal of one given before dissolution, is denied in Lumberman's Bank *v.* Pratt, 51 Me. 563. The same rule was held where a note was given for a debt created before the dissolution. Cunningham *v.* Bragg, 37 Ala. 436. See also Gannett *v.* Cunningham, 34 Me. 56.

(*j*) Usher *v.* Dauncey, 4 Camp. 97; Lewis *v.* Reilly, 1 Q. B. 349. See Myers *v.* Standart, 11 Ohio St. 29.

(*k*) Darling *v.* March, 22 Me. 184.

(*l*) Milliken *v.* Loring, 37 Me. 408.

(*m*) Ide *v.* Ingraham, 5 Gray, 106.

(*n*) Temple *v.* Seaver, 11 Cush. 314.

(*o*) Estate of Davis & Desauque, 5 Whart. 530.

* 391 may renew the * notes of the firm; (*p*) or give notes in the firm name, in payment of firm debts. (*q*)

There are, however, other authorities, which construe the rule that a partner cannot make a new contract after dissolution very strictly, and hold that the power of a surviving partner not only does not extend to the giving of a note, (*r*) or accepting of a bill, (*s*) in the firm name, after dissolution, for a pre-existing debt of the firm, even though it be antedated so as to bear date before the dissolution, (*t*) but also that he cannot renew bills or notes given by the partnership before dissolution, so as to bind his former copartners, (*u*) or indorse notes given to the firm before dissolution, so as to vest the title in the indorsee. (*v*)

Nor, it has been held, can he indorse notes belonging to the firm at the time of the dissolution, so as either to render the other partners liable on his indorsement, or to pass a valid title to the notes. (*w*) It has even been doubted whether a note indorsed before dissolution, but negotiated afterwards, will bind the firm; (*x*) but, if negotiated in good faith for the

(*p*) Id.; Brown *v.* Clark, 14 Penn. St. 469.

(*q*) Robinson *v.* Taylor, 4 Barr, 242.

(*r*) Lockwood *v.* Comstock, 3 McLean, 383; Bank of Port Gibson *v.* Baugh, 9 Smedes & M. 290; Hamilton *v.* Seaman, 1 Ind. 185; Perrin *v.* Keene, 19 Me. 355; Lusk *v.* Smith, 8 Barb. 570. In Mitchell *v.* Ostrom, 2 Hill, 520, the note in suit was signed, "Late firm M., J., E., & Co." [The settlement of a book account, by a note *on time*, given in the name of the firm, by the remaining partner authorized to liquidate, does not bind the retiring partners. They stand to the remaining partner in the relation of sureties; and the latter cannot bind them to any new contracts, imposing additional burdens. Smith *v.* Sheldon, Sup. Ct. Mich. 3 L. & E. Rep. 120.]

(*s*) Tombeckbee Bank *v.* Dumell, 5 Mason, 56.

(*t*) Wrightson *v.* Pullan, 1 Stark. 375; Lansing *v.* Gaine, 2 Johns. 300.

(*u*) Palmer *v.* Dodge, 4 Ohio St. 21; National Bank *v.* Norton, 1 Hill, 572; Parker *v.* Cousins, 2 Gratt. 372; Martin *v.* Kirk, 2 Humph. 529; Long *v.* Story, 10 Mo. 636; Stone *v.* Chamberlin, 20 Ga. 259. In Bank of South Carolina *v.* Humphreys, 1 McCord, 388, the firm, during the continuance of the partnership, had written a letter to the holder of a note against them, requesting permission to renew it, until the expiration of a certain time, during which time a renewal was given by one partner, but subsequent to the dissolution. *Held*, that the firm was not bound. See Van Valkenburgh *v.* Bradley, 2 Iowa, 108, overruling Kemp *v.* Coffin, 3 Greene (Ia.), 190. And see Richardson *v.* Moies, 31 Mo. 430.

(*v*) Sanford *v.* Mickles, 4 Johns. 224; Fellows *v.* Wyman, 33 N. H. 351. See also Geortner *v.* Trustees, &c., 2 Barb. 625; White *v.* Tudor, 24 Tex. 639; [Cavitt *v.* James, 39 Tex. 189.] See note (*n*), preceding page.

(*w*) Abel *v.* Sutton, 4 Esp. 108; Sanford *v.* Mickles, 4 Johns. 224; Parker *v.* Macomber, 18 Pick. 505; Humphries *v.* Chastain, 5 Ga. 166. See Fowle *v.* Harrington, 1 Cush. 146.

(*x*) Per Lord Kenyon, in Abel *v.* Sutton, *supra*.

purposes for which it was indorsed, we are inclined to think it would, although the contrary doctrine has been held. (*y*)

* One partner, after dissolution, may, of course, bind his copartner by any of the above acts, if he have an express authority for that purpose. And such authority may be given by parol, although the terms upon which the partnership was dissolved should be in writing. Thus, where a retired partner stated that he left the assets and securities of the firm in the hands of the continuing partner, for the purpose of winding up the concern, and that he had no objection to his using the partnership name, it was held that the jury were justified in finding that the continuing partner had authority to indorse promissory notes so left in his hands, in the partnership name. (*z*) So an authority by parol to continuing partners to *sell* a negotiable note made to the firm before dissolution, will authorize an *indorsement* of such note, "without recourse," in the name of the firm. (*a*) This authority may also be given by implication; as where one partner receives a note as his portion of the property of the firm. In such case, he may indorse it without recourse; (*b*) but without authority, either express or implied, it has been *held* that such power does not exist. (*c*) So it has been said, that the settling partner's transfer of a bond would be good, under his general authority. (*d*) *392

And it is certain, as has been already said, that, for all ordinary transactions, the power of each partner must be equal to that of any other partner, unless the power of acting in behalf of the firm is confined by agreement to one; and then this power of this one must be complete for the purpose of winding up, unless expressly limited. Therefore, the settling partner

(*y*) In Glasscock *v.* Smith, 25 Ala. 474. The question was raised, but not decided, in Mechanics' Bank *v.* Hildreth, 9 Cush. 359.

(*z*) Smith *v.* Winter, 4 M. & W. 454. In Burton *v.* Issitt, 5 B. & Ald. 267, by a deed of dissolution of partnership, a power was reserved to the remaining partners to use the name of the retiring partner in the prosecution of all suits. In an action in which judgment had been obtained by all the partners before the dissolution, it was *held*, that the remaining partners had authority under that power to give to the defendant a note for the payment of the sixpences, under the Lords' Act, on behalf of themselves and the retiring partner.

(*a*) Yale *v.* Eames, 1 Metc. 486.

(*b*) Waite *v.* Foster, 33 Me. 424.

(*c*) Fellows *v.* Wyman, 33 N. H. 351.

(*d*) Morse *v.* Bellows, 6 N. H. 568.

may pay and receive payment, (*e*) may sell goods con-
*393 signed to the firm before *dissolution, (*f*) and may compromise debts in any way which does not indicate fraud. (*g*) So, too, he may undoubtedly exchange goods, but always for the purpose of winding up the old concern. He has power to draw a bill upon a debtor of the firm, and, on its being accepted, to sue him in the firm name; (*h*) to release a debt due to the firm; (*i*) to pledge shares of stock which the firm had contracted to buy, but had not paid for, to raise the money to pay for the shares; (*j*) to collect, compound, and release debts of the firm. (*k*) But, any thing done by him, however innocent and proper in itself, would not be within the scope of his authority, if it was done for the purpose of continuing the business of the firm, or opening it anew, instead of winding it up. (*l*)

It may be doubted, too, whether he can, without especial authority, buy goods so as to bind the other partners for the purchase. It is not uncommon, in practice, for a settling partner to make small purchases, in order to complete an assortment of goods on hand, and promote the sale thereof. If he does this with cash, in good faith, the seller certainly holds the money, and we should have no doubt that he might credit himself with such payments in his account. But, if he buys on credit, we do not think that the other partners would be held, unless they distinctly authorize the purchase. (*m*)

All the partners, and each partner, have the right of requiring that the settlement should be made with reasonable promptitude, and with entire respect for the rights and interests of each one. And, of course, no partner can have any rights inconsistent with these rights of his copartners. (*n*) And if any

(*e*) Butchart *v.* Dresser, 10 Hare, 453, 4 De Gex, M. & G. 542. See also Parker *v.* Phillips, 2 Cush. 175, 178; Washburn *v.* Goodman, 17 Pick. 519, 536; Fereira *v.* Sayres, 5 Watts & S. 210; Beak *v.* Beak, 3 Swanst. 627.

(*f*) Herberton *v.* Jepherson, 10 Barr, 124.

(*g*) Bass *v.* Taylor, 34 Miss. 342.

(*h*) King *v.* Smith, 4 Car. & P. 108.

(*i*) Napier *v.* McLeod, 9 Wend. 120.

(*j*) Butchart *v.* Dresser, 10 Hare, 453, 4 De Gex, M. & G. 542.

(*k*) Huntington *v.* Potter, 32 Barb. 300.

(*l*) Wilson *v.* Greenwood, 1 Swanst. 481; Crawshay *v.* Maule, id. 507; *Ex parte* Williams, 11 Ves. 3.

(*m*) See Minnit *v.* Whinnery, 5 Bro. P. C. 489, 2 id. (Dublin ed.) 323, 16 Vin. Abr. 244; Vice *v.* Fleming, 1 Younge & J. 227; *Ex parte* Harris, 1 Madd. 583.

(*n*) See Lees *v.* Laforest, 14 Beav. 250; Clegg *v.* Fishwick, 1 Macn. & G. 294; Perens *v.* Johnson, 3 Smale & G.

thing is done which should not be done, or left undone which should be done, a court of equity will interfere. There is, perhaps, no class of questions or of cases in which equity so readily * or so usefully exerts its power as in those * 394 which arise under dissolution of partnership. The guiding principle in its action is, to preserve equally the rights of all parties. (*o*) Hence, no partner can make any use of the property for his own particular benefit; but he will be held chargeable for all the profits and advantages which may accrue from such use, either as trustee, or in some other adequate way. (*p*) And, as a general rule, each partner has an equal right to the possession of the partnership property. If the firm is dissolved, and the partners cannot agree as to the division of it, a court of equity will appoint a receiver to collect and apply the effects. (*q*) Nor can any partner claim to himself any especial commission or payment for his services in settling, unless there be an agreement to that effect; the reason which forbids this after dissolution being the same which forbids such claim for services in the ordinary partnership business; namely, the entire equality of the partners, unless they agree upon some inequality. (*r*) So, too, all compositions or compromises of debts, all settlements, and all the transactions which follow dissolution, must be for the common and equal benefit of all the partners. (*s*)

419; Clements *v.* Hall, 2 De Gex & J. 173.

(*o*) Bennett's Case, 18 Beav. 339, 5 De Gex, M. & G. 284; Benson *v.* Heathorn, 1 Younge & C. 326; York & North Midland R. Co. *v.* Hudson, 16 Beav. 485; Maxwell *v.* The Port Tennant Co., 24 id. 495; Richardson *v.* Larpent, 2 Younge & C. 507; Harris *v.* The North Devon R. Co., 20 Beav. 384.

(*p*) Kelley *v.* Greenleaf, 3 Story C. C. 93, 101; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Pothier, Contr. de Soc. ch. 8, § 4, art. 150. See also Leach *v.* Leach, 18 Pick. 68; Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 68, 70.

(*q*) Terrell *v.* Goddard, 18 Ga. 664. See Stevens *v.* Yeatman, 19 Md. 480.

(*r*) Caldwell *v.* Lieber, 7 Paige, 483; Thornton *v.* Proctor, 1 Anst. 94; Franklin *v.* Robinson, 1 Johns. Ch. 157, 165; Bradford *v.* Kimberly, 3 Johns. Ch. 431; Burden *v.* Burden, 1 Ves. & B. 170; Lee *v.* Lashbrooke, 8 Dana, 219; Paine *v.* Thatcher, 25 Wend. 450; Anderson *v.* Taylor, 3 Ired. 420; Reybold *v.* Dodd, 1 Harr. (Del.) 401; Newland *v.* Tate, 3 Ired. Eq. 232; Phillips *v.* Turner, 2 Dev. & B. Eq. 123; Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 68; Washburn *v.* Goodman, 17 Pick. 519; Hite *v.* Hite, 1 B. Mon. 179. But see Bradley *v.* Chamberlin, 16 Vt. 613; Willby *v.* Phinney, 15 Mass. 120. But see *ante*, p. * 413.

(*s*) See Porter *v.* Wheeler, 37 Vt. 281; Beak *v.* Beak, 2 Swanst. 627;

3. *Of the Effect of a Dissolution upon Third Parties.*

No dissolution of any kind affects the rights of third
* 395 parties, * who have had dealings with the partnership, without their consent. This is a universal rule, without any exception whatever. (*t*) Undoubtedly, the partners may agree as they please about their joint property and all the parts of it; and so they may about their joint obligations. And all such agreements are valid, so far as they do not affect the rights of strangers; but, where they do, they are wholly void. Thus, three partners may agree to-day to dissolve, and to divide all the property in a certain way, specifying that one shall have this, another that, and the third that thing. Or they make such an agreement about some one or more things, and not about all. And these agreements determine the property in these things effectually as to the partners themselves. But they are all responsible *in solido* for the debts due by the firm; and all the joint property of the firm is just as liable for the joint debts, after such division or settlement among themselves, as it was before. (*u*)

So, too, it is very common for the partners to agree not only that one of them *may* settle and wind up the partnership concern, but that one or more *shall* wind it up, and for that purpose shall have in full property all the goods or funds and business, or a certain part of them, and shall pay all the debts; and this he undertakes to do. Such an agreement is so far binding on the partners, that, if either of the others is obliged

Page *v.* McCrea, 1 Wend. 167; Bracket *v.* Winslow, 17 Mass. 153; Hammatt *v.* Wyman, 9 id. 139; Stevens *v.* Morse, 7 Greenl. 36.

(*t*) Story on Part. § 334; Ault *v.* Goodrich, 4 Russ. 430; Gow on Part. ch. 5, § 2, p. 240, 3d edit.; Blundell *v.* Winsor, 8 Sim. 613. [Dissolution does not release the partnership from their liability on a continuing but still unexecuted contract. Dickson *v.* Indiana Mfg. Co., Sup. Ct. Ind., November, 1877, 6 Cent. L. J. 97.]

(*u*) Smith *v.* Jameson, 5 T. R. 601; Dickenson *v.* Lockyer, 4 Ves. 36; Cummins *v.* Cummins, 8 Ired. Eq. 723; Wood *v.* Braddick, 1 Taunt. 104; Hoby *v.* Roebuck, 7 Taunt. 157; Graham *v.* Wichels, 1 Cromp. & M. 188. In Wood *v.* Braddick, Heath, J., says: "When a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future. With regard to things past, the partnership continues, and always must continue." See Smyth *v.* Harrie, 31 Ill. 62. And see a somewhat peculiar case on this subject, Mayer *v.* Clark, 40 Ala. 259; and Myers *v.* Smith, 15 Iowa, 181.

to pay a debt thus assumed by a partner, the partner paying may have his action for the money against the partner who undertook to pay. But, so far as the creditors are concerned, all the partners remain just as responsible to all the creditors, after such an agreement, as they were before. (*v*) Thus, an agreement between the partners, that one of them shall settle up the affairs of the concern, collect and pay the debts, and the like, will not prevent any person from * effect- * 396 ually paying to any partner a debt due the firm; (*w*) even though the debtor has notice of the arrangement. (*x*) And a payment, after dissolution, to an insolvent partner, has been held to be good, where the partner was insolvent at the time the firm was formed, and known to be so to the other partners. (*y*) But, where the legal or equitable interest in a partnership has been transferred to an assignee, a debtor who should pay a debt to either of the partners, after notice of such assignment, would be liable to the assignee. (*z*) And a payment to the executor of a deceased partner is not good. (*a*)

Though these agreements between the partners do not affect the creditors, without their consent, yet it is certain that, if, in any case, they do consent, and for sufficient consideration, they become parties to the agreement, and are bound by it. (*b*) The question whether they have assented, and, if so, whether on good consideration, arises sometimes under every form of dissolution; but far more frequently where there is a change among the members, — one or more going out, and one or more new ones coming in. And then it is important to ascertain who are the debtors or the creditors, under an obligation which existed at the time the contract was made; that is, whether a retiring partner is freed from this obligation, or whether an incoming partner has assumed it. We shall consider the principles applicable to these cases more fully when we treat of this particular form of dissolution; at present, remarking only, in

(*v*) See Rodgers *v.* Maw, 4 Dowl. & Lowndes, 66; Smith *v.* Jameson, 5 T. R. 601.

(*w*) King *v.* Smith, 4 Car. & P. 108; Duff *v.* East India Co., 15 Ves. 198; Coombs *v.* Boswell, 1 Dana, 473.

(*x*) Porter *v.* Taylor, 6 Maule & S. 156.

(*y*) Major *v.* Hawkes, 12 Ill. 298.

(*z*) Gordon *v.* Freeman, 11 Ill. 14. See also Pritchard *v.* Draper, 1 Russ. & M. 191.

(*a*) Wallace *v.* Fitzsimmons, 1 Dall. 248.

(*b*) Buller, J., in Tatlock *v.* Harris, 3 T. R. 180.

the first place, that the consent of the creditors to an arrangement which discharges some of their debtors, may be expressed or implied from circumstances distinctly indicative of their knowledge of the transfer or change of the indebtedness, and of their concurrence and consent; and, in the next place, that this concurrence and consent, whether expressed or implied, will not suffice to exonerate the partners whom it is intended to discharge, unless there be a valuable consideration for it.

Because, as every creditor has the liability of every
* 397 partner, * he only lessens his security by taking one for the whole; and his agreement to do this can bind him no more than any other agreement to discharge a debt, unless he gains some advantage by it, — which may be, by added security, better terms of payment, more favorable business, or any other benefit, — or unless those whom he discharges undergo, at his instance or request, a loss by reason of his concurrence and consent, by paying something to him who undertakes to pay the debt, or in some other way benefiting him at their own cost. (*c*)

Another most important subject connected with dissolution is notice. For, on the same principles which hold a principal bound by the acts of his general agent whose authority he had revoked, unless he has given sufficient notice of his revocation, any person who deals with one professing to act for himself and others as partners in a certain firm, and believes that he so acts, and is justified in that belief, either by what those others so held out as partners have done or have failed to do, has both a legal and a moral right to hold them as partners. (*d*)

(*c*) See, on these questions, Kirwan *v.* Kirwan, 2 Cr. & M. 617; Thompson *v.* Percival, 5 B. & Ad. 925; Lodge *v.* Dicas, 3 B. & Ald. 611; David *v.* Ellice, 5 B. & C. 196, 1 Car. & P. 369; Thomas *v.* Shillibeer, 1 M. & W. 124; Evans *v.* Drummond, 4 Esp. 89; Reed *v.* White, 5 id. 122; Heath *v.* Percival, 1 P. Wms. 682, 1 Str. 403; Bedford *v.* Deakin, 2 B. & Ald. 110; Featherstone *v.* Hunt, 1 B. & C. 113; Spenceley *v.* Greenwood, 1 Fos. & Fin. 297; Robinson *v.* Wilkinson, 3 Price, 538; Gough *v.* Davies, 4 id. 200; Blew *v.* Wyatt, 5 Car. & P. 397; Hart *v.* Alexander, 7 Car. & P. 746; Harris *v.* Farwell, 15 Beav. 31.

(*d*) See Vice *v.* Fleming, 1 Younge & J. 227; Willis *v.* Dyson, 1 Stark. 164; Rooth *v.* Quin, 7 Price, 193; Galwey *v.* Mathew, 1 Camp. 402, 10 East, 264; Pecker *v.* Hall, 14 Allen, 532. [A new contract, after dissolution, in the name of the firm, will bind the firm to those who, having previously dealt with the firm, have had no notice of the dissolution. Dickinson *v.* Dickinson, 25 Gratt. (Va.) 321. See also Lovejoy *v.* Spofford, 93 U. S. 430.]

This is true of every dissolution, excepting that by the death of a partner, (*e*) which event is said to operate an universal notice, or, at least, to render a notice unnecessary. But a creditor, having knowledge of a dissolution of a copartnership when he gives credit to it, cannot recover from members who have retired, however the knowledge was communicated to him. (*ee*) And this is true where the dissolution is by the death of a partner, and the debt is contracted with one having knowledge of the death. (*eee*) The chief importance of this requirement of notice, and the principal questions arising under it, belong to cases of dissolution by change, in which the retiring partner must give notice of his retirement, or continue to be held as partner; and we shall consider when notice and what notice is necessary, more fully, when we treat of that form of dissolution. (*f*)

4. *Of Actions and Remedies after a Dissolution.*

*As the fact of dissolution has no effect whatever on *398 the rights of third persons, or on the rights of the firm against third persons, so it is a general rule, that actions by and against the firm must continue to be what they would have been before the dissolution. That is, all the names of the partners must be used in an action brought by the settling partner, for a debt due to the firm; and, if a debt owed by the firm is sued, not only can all the old partners be sued, (*g*) but it is not enough to make the settling partner sole defendant, even if he have undertaken to pay all the debts of the firm, unless it is intended to discharge all the other partners.

In one case, (*h*) where two persons, forming a partnership,

(*e*) Devaynes *v.* Noble, Houlton's Case, 1 Meriv. 616, Johnes' Case, id. 619, Brice's Case, id. 620; Webster *v.* Webster, 3 Swanst. 490; Blades *v.* Free, 9 B. & C. 167; Smout *v.* Ilbery, 10 M. & W. 1; Campanari *v.* Woodburn, 15 C. B. 400. [One who suffers his name to be used in a firm after his retirement, is responsible to new customers as well as old, who do not have actual knowledge of the change, *Re* Krueger, 2 Lowell Dec. (U. S. Dist. Ct.) 66; and is estopped to deny his responsibility, Speer *v.* Bishop, 24 Ohio St. 598.]

(*ee*) Davis *v.* Keyes, 38 N. Y. (Tiffany) 94.

(*eee*) Stanwood *v.* Owen, 14 Gray, 195.

(*f*) See Chamberlain *v.* Dow, 10 Mich. 319.

(*g*) Dobbin *v.* Foster, 1 Car. & K. 323.

(*h*) Atkinson *v.* Laing, Dowl. & R. N. P. 16.

had carried on trade, and, after this partnership was dissolved, one of them carried on his own business, under the name of the partnership, it was *held* that this person might bring an action for goods sold and delivered by the partnership. The case seems to leave it in doubt whether the goods were sold and delivered *by* the partnership, or only *during* the partnership; but the remark of the judge who tried the case, that, if the defendant had any counter demand against the partnership, it would have been necessary to bring the action in the name of the partnership, seems to indicate that the action was for a debt due to the partnership. His remark, that the plaintiff was really entitled as "remaining partner," is not very intelligible: the case does not indicate that he was a surviving partner, and seems to us of very doubtful authority. We shall see, in speaking of dissolution from bankruptcy, that the solvent partner may sometimes sue alone, without joining either the bankrupt partner or his assignees.

A dissolution may put an end to a right or interest held by a partnership, if it be held on condition that the partnership exists, or if it be of such a nature that the law considers it as existing only while the partnership exists; but not if the continued existence of the right or interest is independent of the existence of the partnership. Thus, a common lease to a firm, from a stranger, is a property which survives the dissolution. All the partners continue to be bound for the rent, and all are entitled to the beneficial use of, or interest in, the lease.
*399 But if it * is stipulated that it be held during the partnership only, the lease is terminated by the dissolution. (*i*) So, a lease held by the partners, as partners, from one of them, is terminated by the dissolution; and the lessor may at once re-enter, without notice. (*j*)

(*i*) Waithman *v.* Miles, 1 Stark. 181.
(*j*) Colnaghi *v.* Bluck, 8 Car. & P. 464.

SECTION V.

OF DISSOLUTION BY THE ACT OF A PART OF THE FIRM ONLY.

1. *What Acts Dissolve a Partnership.*

Dissolution of partnership may occur by the act and intent of some of the partners only, or as the effect of some act or condition of theirs. (*k*) Without now speaking of these acts or conditions, which are good cause for a decree of dissolution, we may speak of some which, of themselves, operate a dissolution. One of these, at common law, is outlawry; and, although we know nothing of this here, we have conviction for felony. In England, where attainder forfeits the property of the convict to the king, who cannot be a tenant in common with a subject, it not only dissolves the partnership, but transfers to the king all the joint property of the partnership. That effect of the rule exists now in England only in theory, if it ever was applied to a case of partnership. In this country, we know nothing of it. But still, we suppose that a conviction for felony would here operate a dissolution, of itself, and without waiting for a decree. But it may be open to question whether notice is necessary in this case. If a convicted partner used the name of the firm, apparently in its business, immediately after his conviction, we should say, that it would bind the firm to a party who had no knowledge of the felony, and no especial means of knowledge.

So, on the marriage of a female partner, the other partner may dissolve the partnership; for all the rights, interests, and property she can hold as partner, pass at once to the husband, by the common law, as *completely by mar- *400 riage as they would by any transfer; and she loses all power of binding herself by any contract. (*l*)

Whether a partner has or has not a right to terminate the partnership at his pleasure, (*m*) it is certain that an assign-

(*k*) Peacock *v.* Peacock, 16 Ves. 50; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Crawshay *v.* Maule, 1 Swanst. 508; Miles *v.* Thomas, 9 Sim. 606.

(*l*) Nerot *v.* Burnand, 4 Russ. 247; and see Brown *v.* Jewett, 18 N. H. 230.

(*m*) Equity would probably restrain to prevent irreparable mischief. See Chavany *v.* Van Sommer, 3 Woodd. Lect. 416, n., 1 Swanst. 512, n.; Blisset *v.* Daniel, 10 Hare, 493.

ment by one partner, of all his interest in the joint property, to the other partner or partners, operates at once the withdrawal of the assignor and a dissolution of the firm. For, here the other partners assent to the transfer, by their acceptance of it; and, therefore, no question could be raised as to the right of the assignor. (*n*) And an assignment to a third person has the same effect. (*o*)

So an assignment, in good faith, by a partner, of all the joint property in trust, for the payment of the debts of the firm, which, as we have seen, is, by the weight of authority, valid, would undoubtedly operate a dissolution. (*p*) And so would a sale on execution and levy upon the interest of an insolvent partner in the joint property. (*q*) But an attachment alone, in *mesne* process, only gives a lien to the creditor; and does not transfer to him the property, and, therefore, does not dissolve the partnership. (*r*) These cases of assignment to pay debts, and sale on execution, however, belong rather to the subject of dissolution by bankruptcy. Let us consider here what right a partner has to terminate the partnership at his own will, and by his direct action.

*401 While the courts have found much difficulty in compelling *parties to remain together, when a part of them wish for a separation, it has never been said, that a contract for a partnership, for a time certain, is, as to this limitation, wholly inoperative in law or in equity. On the

(*n*) Heath *v.* Sanson, 4 B. & Ad. 175; Cochran *v.* Perry, 8 Watts & S. 262.

(*o*) Jefferys *v.* Smith, 3 Russ. 158; Marquand *v.* N. Y. Manuf. Co., 17 Johns. 525; Horton's Appeal, 13 Penn. St. 67; Conwell *v.* Sandidge, 5 Dana, 210; Parkhurst *v.* Kinsman, 1 Blatchf. C. C. 488. See Merrick *v.* Brainard, 38 Barb. 574. In Buford *v.* Neely, 2 Dev. Eq. 481, the general doctrine was assented to; but as the assignment in that case was as security for a debt, and it was agreed by all parties that the assignor should continue in business as the agent of the assignee, it was *held* that the partnership was not dissolved. And, if, notwithstanding such assignment, the assignor continues to act as a partner, and transacts business as before, there is no dissolution. Taft *v.* Buffum, 14 Pick. 322.

(*p*) See Gordon *v.* Freeman, 11 Ill. 14.

(*q*) Habershon *v.* Blurton, 1 De G. & S. 121; Aspinall *v.* London & N. W. R. Co., 11 Hare, 325; Skipp *v.* Harwood, 2 Swanst. 586; Renton *v.* Chaplain, 1 Stock. Ch. 62; Johnson *v.* Evans, 7 M. & G. 240. A purchase by other partners of the share so sold, must be made under circumstances placing it beyond suspicion; otherwise, the sale will be set aside, the partners being treated as the trustees of the other partner. Perens *v.* Johnson, 3 Smale & G. 419.

(*r*) Arnold *v.* Brown, 24 Pick. 38.

other hand, it is universally agreed, that where there is no such limitation, — that is, where the contract is not for a certain time, — it is always in the power of any one partner to dissolve the partnership, at his own pleasure, and for no other cause than that pleasure. (*s*) Still, we should say, that the dissolution must be in good faith, and not unreasonable in point of time or manner, or unnecessarily injurious to the other partners. (*ss*) In order to effect a dissolution in such a case, it is necessary for the partner wishing to dissolve to give notice to the other partners. (*t*)

Where a partnership for a limited period expires, and is continued by an agreement which does not provide for any further limitation, the effect of the original limitation is wholly exhausted, and the new partnership is dissoluble at the will of any partner; although all the other provisions and arrangements are continued over, either expressly or by implication. (*u*) It may be said, however, that where all these are carried over, if they seem distinctly to imply that the partnership must needs continue for a definite period, the law might be more willing to imply such a bargain, than it is, as we have seen, from a mere lease for a time, or from similar circumstances.

2. *At what Time and in what Manner a Partner may terminate a Partnership.*

A partnership without any limitation as to time is construed *as one at will, and any partner may dis- *402

(*s*) Peacock *v.* Peacock, 16 Ves. 49; Featherstonhaugh *v.* Fenwick, 17 id. 298, 307; Alcock *v.* Taylor, 1 Tamlyn, 506; Crawshay *v.* Maule, 1 Swanst. 495, 508; *Ex parte* Nokes, 1 Mont. on Part. 114, n.; Skinner *v.* Tinker, 34 Barb. 333.

(*ss*) This was so *held* in the well-considered case of Howell *v.* Harvey, 5 Pike, 270.

(*t*) Eagle *v.* Bucher, 6 Ohio St. 295. See also Van Sandau *v.* Moore, 1 Russ. 464; Wheeler *v.* Van Wart, 9 Sim. 193.

(*u*) Featherstonhaugh *v.* Fenwick, 17 Ves. 298, 307; Crawshay *v.* Collins, 15 id. 218. In Booth *v.* Parks, 1 Molloy, 465, the Lord Chancellor states the rule thus: "The partners, after the expiration of the partnership term, continuing to carry on the trade without a new deed, all the old covenants are infused into the new series of transactions, with the single exception of the covenant for duration; for either may *instanter* dissolve the prolonged partnership, but the original stipulations are continued." See also Gould *v.* Horner, 12 Barb. 601; Bradley *v.* Chamberlin, 16 Vt. 613; U. S. Bank *v.* Binney, 5 Mason, 176, 185. See *post*, p. *405, note (*d*).

solve it at any moment. (*v*) The Roman law, as stated in the Digest, (*w*) and as explained or exhibited by Domat, (*x*) contains principles on this subject which are not only not expressly adopted in the English or American jurisprudence, but which might seem to be opposed to the highest and clearest authority. It may be inferred from Domat, that every partner has a perfect right to terminate the partnership when he will, even if entered into for a time certain. He must, however, take a convenient and suitable opportunity and method for the exercise of this right; and must do this for honest purposes, and with due regard to the safety and advantage of the other partners. The line is not very distinctly drawn. But *it seems* that he may, at any moment and for any cause, dissolve the partnership so as to renounce or lose all the benefit of it; but that he would not be permitted to free himself or his property from the just claims of the other partners, which may extend so far as to require that the partnership shall continue for a season. He cannot therefore seize a moment to dissolve a partnership when he sees the opportunity of making a great gain by a separate transaction, which ought, with all its advantages, to belong to the firm. And if he does, in this way and for this purpose, seek to dissolve the partnership, the court would declare the dissolution void, or ineffectual for the time, and the partnership to continue until it could be terminated without wrong to anybody. We think a court of equity would apply similar principles to this question. (*y*)

If we suppose a partner, with wrongful intent, to declare a dissolution at such a time, and for such purposes, or with such an effect, that the Roman law would declare that there was no dissolution, and so preserve the rights of the partners, it may be asked what an English or American court would do. They would not, we apprehend, deny the right of dissolution, or the fact of dissolution; nor perhaps in any way restrain the partner from the exercise of this right. But, it being settled that the partnership is now dissolved, the whole effect and influence

(*v*) See *supra*, note (*s*).
(*w*) Dig. lib. 17, tit. 2, l. 14.
(*x*) 1 Domat, tit. 8, § 5, art. 1–8.
(*y*) See Chavany *v.* Van Sommer, 3 Woodd. Lect. 416, n., 1 Swanst. 512, n.; Blisset *v.* Daniel, 10 Hare, 493.

of this dissolution is in the hands and within the power of equity. It may be that the other partners would be subjected to wrong and loss, if the use of the firm name could not be continued in completing its transactions, * or otherwise in protection of their interests; and yet that the court would be reluctant to authorize the use of the name of a firm which had ceased to exist. But it is hardly possible that the same results could not be reached in some other way, which would be within the resources of equity. And it must be certain that any court of equity would be willing to use all its authority, in any lawful way, to carry the dissolution into effect; or, in other words, to direct the winding up of the concern in such a way as to protect the honest partners from any loss through the wrongful act or wrongful purpose of a copartner. And if it be true, as we suppose, that equity could always do this, and would always do it when practicable, it follows that the difference between the Roman law and the English, or our own, is only a difference in the rules or methods by which the two systems of law accomplish the same results. * 403

There is no exactly defined way in which a partner who has the right to terminate a partnership must or should exercise this right. All that is requisite is, that he should make this purpose distinctly known to the other partners; and, as soon as it is known, it takes effect. (*z*) The notice must be explicit; and it is not enough to propose to dissolve on certain terms, unless these terms are accepted. (*a*) So, a notice that a partner's share has been forfeited is not enough; because this is construed to mean merely that the partner named has *ceased* to have any interest in the concern. (*b*) A partner may undoubtedly make this dissolution prospective; and this is the usual way of doing it. It is obvious that only peculiar circumstances could justify a partner morally speaking, however it might be legally, in saying to his copartners, at once and without notice or preparation, From this moment the partnership ceases to exist. And such conduct would certainly in-

(*z*) See *ante*, p. * 401 and note (*s*).

(*a*) Hall *v.* Hall, 12 Beav. 414; Van Sandau *v.* Moore, 1 Russ. 463; Wheeler *v.* Van Wart, 9 Sim. 193. See Mellersh *v.* Keen, 27 Beav. 236.

(*b*) Hart *v.* Clarke, 6 De G., M. & G. 232.

duce a court of equity to examine closely into the motives which led to it, and into the effects resulting from it, that they might prevent injurious consequences. Still, however, it is always possible that there may be good reason for the sudden exercise of this right, of the existence of which there seems to be no doubt, where the partnership is not formed for a time
*404 certain. It * may be that no other course would prevent the firm from rushing into wasteful and dangerous contracts, or from pursuing a path which might lead to ruin. And, therefore, on the one hand, the court would not *presume* that such a dissolution was wrongful in intent or effect, although they would listen to evidence showing it to be so. And, on the other hand, as soon as such a declaration was made, be its purpose or circumstances what they might, we are not aware of any reason for supposing that the partnership would exist a moment longer. (*c*)

The dissolution of the partnership by the act of a partner, or at his will, does not require a written declaration of his will; nor even any especial spoken words, or, indeed, any words whatever. He must manifest his desire of withdrawing from the partnership. He may do this as he pleases; and, however it be done, it has the same effect. But, if he only manifest his desire of leaving the partnership at a future time, this is not a present dissolution. Nor is there any way to manifest the purpose of immediate withdrawal, except by such withdrawal; and this is a dissolution. This could hardly be by act without words. But he may manifest, by a course of action, such with-

(*c*) The question whether one partner may, by his own mere will, dissolve a partnership formed for a definite period, has been much discussed in this country and in England. It appears to have been assumed that there is no such power, in Peacock *v.* Peacock, 16 Ves. 57; Crawshay *v.* Maule, 1 Swanst. 508; Wheeler *v.* Van Wart, 9 Sim. 193, 2 Jur. 252; Pearpoint *v.* Graham, 4 Wash. C. C. 232. The right is forcibly maintained in Skinner *v.* Dayton, 19 Johns. 538; Mason *v.* Connell, 1 Whart. 381. In Bishop *v.* Breckles, 1 Hoff. Ch. 534, the court said: "The law of the court then requires something more than the mere will of one party to justify a dissolution. But it seems to me that but little more should be demanded. The principle of the civil law is the most wise. Why should this court compel the continuance of a union, when dissension has marred all prospect of the advantages contemplated by its formation? By refusing to dissolve it, the power of binding each other, and of dealing with the partnership property, remains, when all confidence and all combination of effort is at an end. The object of the contract is defeated."

drawal. He may engage wholly in other business, and take no part whatever in the interests or concerns of the partnership. This would rather make him a silent partner, or give good cause for the other partners to reject him, or perhaps obtain a decree for his removal, than amount to evidence that he had in fact withdrawn himself. It may, however, be said, hypothetically, that such conduct might be carried so far as to have that significance and effect. And then the * dis- *405 solution would take place, not when the other partners acceded to his wish, but when it became certain what his wish was. The only rule applicable to such questions must be this: The wish of a partner to dissolve a partnership which is at will, while it remains unexpressed, can have no force nor effect; but it operates to cause a dissolution as soon as it is distinctly expressed, whatever be the form or manner of this expression. (*d*)

(*d*) In Van Sandau *v.* Moore, 1 Russ. 463, Lord Eldon says: "The bill proceeds on two grounds: one, that Mr. Van Sandau could by mere notice put an end to the company; the other, that if notice alone was not sufficient for that purpose, yet there has been such conduct on the part of the secretary and other members as to entitle the plaintiff to call for a dissolution; and, in either case, he prays that an account may be taken of the partnership dealings and transactions. Now, though, according to the law of the country, a company or partnership formed by parties agreeing to become copartners may be dissolved at any moment by one of the partners, and though his copartners cannot answer his notice of dissolution by saying, 'Here is your money, get out of the concern, and leave us to ourselves' (because he has a right to have all the accounts of the partnership dealings and transactions taken, up to that very moment); yet one difficulty which has often occurred to me as of great weight in cases like the present, with reference to the dissolution of the company by notice, is this: What avails it that you give notice to A. B. of putting an end to the company, if you do not give notice to the three hundred other individuals of whom it is composed? Has not every one of these individuals the same common-law right to notice, before the partnership can be so dissolved? If, on the other hand, it is said, that it is not necessary to give notice to all the partners, it must be on the ground that the deed has made some provision declaring that notice not to be necessary, which, but for particular provisions, would be necessary; and that case must be proved from the deed itself."

CHAPTER XIII.

OF A CHANGE IN THE PARTNERSHIP.

SECTION I.

OF THE EFFECT OF ANY CHANGE IN THE PARTNERSHIP.

THE retirement of a partner may take place in many ways. He may simply withdraw, carrying with him and retaining all his interest in the property. Or he may retire, by transferring his interest to a stranger, who then holds it as tenant in common with the other partners. Or he may transfer it to one who is received by the other partners, and becomes a copartner with them. However it takes place, it is plain that, if a partnership consists of but two persons, the retirement of either one puts an end to that partnership. And it may now be considered as a settled rule of the law of partnership, in England and in this country, that the retirement of any one partner from a firm consisting of any number of partners operates a dissolution of that firm. The Institute says, "*Cum aliquis renunciaverit societati, solvitur societas.*" (*a*) In Roman practice, mercantile copartnerships consisting of many partners, if not common, were certainly known. Only of late years has this rule been asserted; and it was qualified by Lord Eldon, who was almost its author, and ever was its highest authority, by the phrase, "unless it was otherwise provided." (*b*) We apprehend, however, that the rule comes of necessity from the very nature of partnership, and admits of no qualification whatever. Thus, if we take the qualification mentioned by Lord Eldon, — that of an express provision to the contrary, — it is plain that, even if

(*a*) Inst. L. 3, t. 26, § 5; Pothier on Part. ch. 8, § 3, p. 141.

(*b*) Crawshay *v.* Collins, 15 Ves. 228; Peacock *v.* Peacock, 16 id. 49; Howe *v.* Thayer, 17 Pick. 95.

it is so provided, the remaining partners can only * form * 407
a new partnership. The qualification is, therefore, equivalent to saying, that the old partnership is dissolved unless a new one is formed; which is meaningless. We suppose the truth to be, that if a partner retires, — whether by voluntary act, bankruptcy, expulsion, or death, or if a new partner comes in, by any means whatever, — in either of these cases, the old partnership ceases to exist. (*c*)

Where a mortgage was given to a firm consisting of "A. and B." to secure advances to the mortgagor, and a third partner was taken in, and the name changed to "A., B., and Co.," and the business was continued and conducted precisely as before, it was held that this addition dissolved the first firm, and that the new firm could not avail themselves of the mortgage. (*cc*)

But a deceased partner may have provided by will, or a retiring partner by assignment, that his interest shall be so retained or reserved in the partnership as to prevent the determination of the partnership as to his estate; and then the estate of the deceased or retiring partner personally continues liable. (*ccc*)

If it is provided by the articles that, if either party dies, his personal representatives, or his son, or some one else, shall take his place, and this partner dies, his death does not *ipso facto* introduce this other party. The assets of the deceased are responsible, of course, for the debts of his firm, but his representatives are not; nor are they bound by the new contracts of the firm, nor have they power to bind the firm by their acts, unless some agreement is entered into which constitutes them partners. And this agreement makes a new partnership. And, in the case of an association for some special purpose, the articles might so provide as to continue the association (which, however, would be different from a common partnership) after a change of members. (*cd*)

This rule is directly opposed to a common practice, and, per-

(*c*) Vulliamy *v.* Noble, 3 Meriv. 614; Crawshay *v.* Maule, 1 Swanst. 509; Crawford *v.* Hamilton, 3 Madd. 251; Scholefield *v.* Eichelberger, 7 Pet. 586; Dyer *v.* Clark, 5 Metc. 575; Washburn *v.* Goodman, 17 Pick. 519; White *v.* Union Ins. Co., 1 Nott & McC. 559. And see *post*, p. * 452–454.

(*cc*) Abat *v.* Penny, 19 La. Ann. 289.

(*ccc*) *Ex parte* Wilson, Buck, 48.

(*cd*) Troy Factory *v.* Corning, 45 Barb. 231.

haps, to a common understanding. We have in this country many ancient firms, in which there may not be one person who was a partner from the beginning. In England, there are firms which have survived some generations; (*d*) but the name has never been changed, and the business has gone on without deviation or interruption. But we still say that the partnership is dissolved by every change, because every partnership consists of certain persons who are all liable for the debts, who all own a certain joint property, and who all have certain powers to act for and to bind each other. Those who owe the firm owe only them, and those to whom the firm is indebted have claims only on them. If from this partnership any persons go out, or if any come into it, and the old partners and the old debtors and creditors agree, there will be the least possible break to the succession. But this agreement no more makes the old firm identical with the new, than the son's inheritance of his father's property, coupled with an accepted promise to
*408 be responsible for all his debts, makes the * son the same individual with the father. That this mere agreement, however effectual in sustaining and continuing a business, cannot preserve the identity of the old partnership, may be seen from this supposition: If A., B., & C. have for a long time been partners, and conclude to retire, and D., E., & F. say to them, It is a pity to scatter so profitable a business and lose so good a custom, and we will buy your good-will, and take all your stock, and pay all your debts, and hold by assignment all the debts due to you, and bring to you the consent of all your debtors and creditors, — one would hardly say that the old firm continued over, or was identical with the new one. One firm succeeds the other; and, if the later firm chooses to adopt the name of the earlier, this does not make them one and the same. And, if one member of the old firm comes into the new firm, this does not make them one. And if all remain but one, or all remain and a new one is added, here also is a new firm, which can no more have the effects and choses in action of the old, nor be liable for its debts, without a new and distinct agreement between all parties interested therein, than if the change were entire, and the name also.

(*d*) See Blisset *v.* Daniel, 10 Hare, 493, 23 Eng. L. & Eq. 105.

We have dwelt the more strongly on this principle, — and shall have occasion to refer to it again, — because a disregard of it has led to some confusion in the authorities in relation to the rights and obligations of a retiring partner, and of an incoming partner, — a subject which we shall now proceed to consider.

SECTION II.

OF A RETIRING PARTNER.

1. *How Retirement, of itself, affects the Liability of the Partner.*

The right of a partner to retire is the same thing as the right to dissolve a partnership; because retirement is dissolution. This we have already considered; and it has also been stated, that he may retire in either of many ways. The effect of the retirement (excepting so far as mutual agreements vary it) is nearly the same in all. *He neither loses prop- *409
erty by it, nor relieves himself from any liability.(*f*) If he retires with the consent of the other partners, there is an implied promise on their part to pay the debts of the firm and save him harmless, but only to the extent of the assets of the firm. He is still liable *in solido* for the debts existing when he retired. But, if he pays more than his proportion, he may have contribution from his former copartners. (*ff*) If he "sells out," — to use a common phrase, — either to the remaining partners, (*g*) or to a stranger, the question may arise whether, in addition to what he actually transfers, he comes under any obligation which a court of law or of equity could recognize. Not unfrequently, the articles of copartnership provide that the remaining partners may take the interest of an outgoing partner at a valuation, or they prescribe other terms; and these agreements a court of equity will enforce. (*gg*) If he sells his share of all the joint property and effects, he

(*f*) But see Savage *v.* Rockwell, 32 N. Y. 501.

(*ff*) Hobbs *v.* Wilson, 1 West Va. 50.

(*g*) As to how the remaining partner takes, see Dimon *v.* Hazard, 32 N. Y. 65.

(*gg*) Quinlivan *v.* English, 42 Mo. 362.

certainly sells his share of so much of the good-will of the business as is attached to the property and effects, and goes with them to the purchaser. Does any obligation rest on the seller to do nothing which shall lessen the value of what he sells? Suppose that the business is very lucrative, and the purchaser has paid much more than the value of the partner's interest in the merchandise, because of the profit of the business connected with the stock; can the seller forthwith set up the same business in the immediate vicinity, and use his experience to establish his new concern at the expense of the old one? The answer of the law is, that he may do this very thing, with an exception, perhaps, as to the use of the old name. (*h*) In other words, the purchasers of a partner's share in the property, and the "plant" (as it is called in England), buy the good-will attached to the merchandise, but do not purchase from him any obligation not to lessen the value of what they buy by his interference with it, unless there be an express stipulation to that effect. Then this bargain "in restraint of trade," as it is called, would be governed by precisely the same principles in the case of a retiring partner as if it were a sale of a business by a sole trader to a stranger. These principles are now established with a considerable degree of precision. A
* 410 promise on a consideration, * not to carry on a certain trade within certain limits, is valid at law as well as in equity. (*i*) But a general promise, not to carry on a certain

(*h*) Kennedy *v.* Lee, 3 Meriv. 455. See also Farr *v.* Pierce, 3 Madd. 74. In Churton *v.* Douglas, II. R. V. Johns. Ch. 174, one of the partners having sold to his copartners his interest in the concern, including the good-will of the business, the latter complained that he purposed to establish the same line of business in their immediate neighborhood, and to conduct it under the old firm name, that name being his own personal name, with the addition of the word "Co." The court *held*, that, though upon the sale of the good-will of a business, the vendor was at liberty to set up a precisely similar business, and that next door to the premises where the original business had been carried on, yet he was not at liberty to do so under the old style or firm, although his name should be the only one appearing in the firm.

(*i*) Broad *v.* Jollyfe, Cro. Jac. 596; Mitchell *v.* Reynolds, Fortescue, 296, 1 P. Wms. 181; Davis *v.* Mason, 5 T. R. 118; Bunn *v.* Guy, 4 East, 190; Gale *v.* Reed, 8 id. 80; Bryson *v.* Whitehead, 1 Sim. & S. 74; Young *v.* Timmins, 1 Cromp. & J. 331; Proctor *v.* Sargent, 2 Man. & G. 20; Hilton *v.* Eckersley, 6 Ellis & B. 47, 32 Eng. L. & Eq. 198; Pierce *v.* Fuller, 8 Mass. 223; Stearns *v.* Barrett, 1 Pick. 443; Nobles *v.* Bates, 7 Cow. 307; Chappel *v.* Brockway, 21 Wend. 157; Jarvis *v.* Peck, 1 Hoff. Ch. 479; Grasselli *v.* Lowden, 11 Ohio St. 349.

trade anywhere, is void as against the policy of the law. (*j*) The courts of England, and still more of this country, are quite liberal in the application of this rule; and almost any limits are sufficient. It may be added, that the contract of sale by a retiring partner might contain such phrases as, "I being about to change my business," or "intending to give up all business," or other words so distinctly indicative of his purpose not to interfere with the fullest enjoyment of what he sells, that a court of equity would either construe this as a contract to that effect, or as a fraudulent deception by the seller, and on one or other of these grounds restrain him from injurious interference, although there might not be enough in the contract to sustain an action at law for the breach of it. (*k*)

2. *Of Notice.*

Much the most important question in relation to a retiring partner, is, by what means and to what extent he may terminate his liability for the debts of the partnership, so that it shall attach to * no new obligations; and how he may *411 escape from his liability for existing obligations. (*l*)

To the first question, the immediate and general answer is,

The cases show a gradual enlargement of the rule which prohibits contracts in restraint of trade, until at the present day — at least in this country — almost any thing in the contract which can be construed as a limitation of it is deemed sufficient to take it out of the rule. Thus, in Stearns *v.* Barrett, *supra*, a promise not to use certain machines in any of the United States, except Massachusetts and Rhode Island, was *held* good, because "agreements to restrain trade in particular places are valid in law, and may be enforced."

(*j*) Alger *v.* Thacher, 19 Pick. 51; a leading case, which fully presents the earlier authorities, English and American; Hilton *v.* Eckersley, 6 Ellis & B. 47. See also Jones *v.* Lees, 1 Hurlst. & N. 189; Dunlop *v.* Gregory, 6 Seld. 241; also, cases cited in preceding note.

(*k*) The obligation of the retiring partner is frequently determined by the language of the articles, or in some such way. Thus, where it was provided that, on giving notice, either party should have liberty "to quit the trade and mystery of a brewer," and the other might continue the trade upon his own account, it was *held*, that the party leaving could not engage in the brewery trade on his own account, but was bound to quit it altogether. Cooper *v.* Watson, 3 Doug. 443, 2 Chitty, 451.

(*l*) See *ante*, p. *397. And see Park *v.* Wooten's Ex., 35 Ala. 242; Williams *v.* Bowers, 15 Cal. 321. One partner may exempt himself from future liability by giving express previous notice that he will not be bound. Matthews *v.* Dare, 20 Md. 273. See Am. Linen Thread Co. *v.* Wortendyke, 24 N. Y. 550; Spaulding *v.* Ludlow Woollen Mill, 36 Vt. 150.

He must give notice of this retirement, and cannot be held as a partner for any new obligation, by those who have this notice of dissolution or of retirement; (*ll*) nor by those who have knowledge thereof, however communicated. (*lll*) But many nice questions have arisen under the application of this rule. (*m*)

The reason of the rule is perfectly obvious. They whom he authorizes to think him a partner may hold him as such; and being a partner, and being known as a partner, he authorizes all to think him so who do not know that he has ceased to be one. If we suppose no fraud on his part, there is negligence on his part; and, of two innocent persons, he should suffer whose negligence caused the error. (*n*)

The commercial world fully recognizes this necessity of notice; and the custom of giving it is universal. Sometimes personal notice is given orally, or, which is better, by letter to all who deal with the concern; sometimes by advertisement; sometimes only by a change of name upon the signs of the firm, and sometimes by a change in the name of the firm itself; sometimes by all these methods together. In this country, much the most usual methods are advertisement, with a change in the names upon the sign; (*o*) in addition to this, notice by letter is frequently given to the customers of the firm. If a change is made in the name of the firm, this is the most effectual of all. Indeed, if it be a change which leaves out the name of the retiring partner, it would be, of itself,

(*ll*) Robb *v.* Mudge, 14 Gray, 534; Lange *v.* Kennedy, 20 Wis. 279.

(*lll*) Davis *v.* Keyes, 38 N. Y. 94.

(*m*) See Vice *v.* Fleming, 1 Younge & J. 227; Willis *v.* Dyson, 1 Stark. 164; Rooth *v.* Quin, 7 Price, 193; Galway *v.* Matthew, 1 Camp. 464, 10 East, 203; Godfrey *v.* Turnbull, 1 Esp. 371; Abel *v.* Sutton, 3 Esp. 108; Kilgour *v.* Finlyson, 1 H. Bl. 155; Bernard *v.* Torrance, 5 Gill & J. 383.

(*n*) Parkin *v.* Carruthers, 3 Esp. 246; Williams *v.* Keats, 2 Stark. 290; Brown *v.* Leonard, 2 Chitty, 120; Newsome *v.* Coles, 2 Camp. 617; Dolman *v.* Orchard, 2 Car. & P. 104; Carter *v.* Whalley, 1 B. & Ad. 11; Tombeckbee Bank *v.* Dumell, 5 Mason, 56; Lansing *v.* Gaine, 2 Johns. 300; Ketcham *v.* Clark, 6 id. 144, 148; Le Roy *v.* Johnson, 2 Pet. 198, 200; Princeton & K. Turnpike Co. *v.* Gulick, 1 Harr. 161; Buffalo City Bank *v.* Howard, 35 N. Y. 500; Ennis *v.* Williams, 30 Ga. 691; Pursley *v.* Ramsey, 31 Ga. 619; Ellis *v.* Bronson, 40 Ill. 455; Denman *v.* Dosson, 18 La. Ann. 9; Zollar *v.* Janvrin, 47 N. H. 324.

(*o*) See Wrightson *v.* Pullan, 1 Stark. 375, called Wright *v.* Pulham, 2 Chitty, 121; Watkinson *v.* Bank of Penn., 4 Whart. 432; Prentiss *v.* Sinclair, 5 Vt. 149; Graves *v.* Merry, 6 Cowen, 701; Ketcham *v.* Clark, 6 Johns. 144, 147.

nearly sufficient and decisive. For every new contract would be * in the name of a firm of which he never was * 412 a member; and, if the change is by dropping his name, it would seem to be complete notice. It is true, however, that a partner may be not named; and it may be true that a partner who has been active and known may wish to become silent and unknown, and therefore wish his name dropped. In such case, he would still be liable; and therefore he would be liable if the circumstances connected with his supposed responsibility justified strangers or customers in believing this to be the case. (*p*)

An important distinction is made between those who are customers of the firm, or who have dealt with it as having the retiring partner among the partners, and those who are only new customers, beginning their dealings with the firm after the retirement. For a new customer holds, generally, only those who are actually partners; because he has no past dealings to furnish a foundation for the belief that the retiring member is a partner. To this rule there are exceptions. Precisely as one who buys for the first time has a valid claim on a party who by his own act or consent is held out as a partner, although he is not one, so a new customer of an old firm may sell to it on the credit of one who has long been known as a partner, and whose retirement has been kept secret. This credit would appear to be justified by the retiring partner, and therefore would hold him. But it would seem that the notice which would destroy this credit with new customers is quite different from that which would have this effect upon old customers. Perhaps a general rule may be stated thus: In respect to persons who have had dealings with the firm, it is necessary to show either notice to them of a dissolution, (*q*) or actual knowledge on their part, or, at least, adequate means of knowledge, of the fact. (*r*) And,

(*p*) 3 Kent Comm. Lect. 43, p. 67; Gow on Part., ch. 5, § 2, pp. 248–251, 3d ed.; Watson on Part., ch. 7, p. 384; 2 Bell Comm., b. 7, pp. 460–643, 5th edit.

(*q*) Conro *v.* Port Henry Iron Co., 12 Barb. 54; Graves *v.* Merry, 6 Cow. 701; Ketcham *v.* Clark, 6 Johns. 144; Clapp *v.* Rogers, 2 Kern. 283; Magill *v.* Merrie, 5 B. Mon. 168; Pope *v.* Risley, 23 Mo. 185; Hutchins *v.* Bank of Tenn., 8 Humph. 418; Deford *v.* Reynolds, 36 Penn. St. 325; Scheifflin *v.* Stevens, 1 Wins. No. 1, 106.

(*r*) See *infra*. And see Reilly *v.* Smith, 16 La. Ann. 31; Williamson

*413 *as to those who have not been dealers, a retiring partner can exonerate himself from liability by publishing notice of the dissolution, (*s*) or by showing knowledge of the fact. A notice by public advertisement, in a usual way and to a usual extent, or any notice which, under the circumstances, was equal to a public advertisement, would always be sufficient to protect the retiring partner against new customers; (*t*) because it is obviously impossible for him to know who may thereafter deal with that firm. But he does know or may know who have dealt with it, and may make it sure that they have notice; and therefore it is his duty to make this certain, and he takes upon himself the risk of their ignorance. Mr. Justice Story appears to go so much further as to hold that no new customers can hold the retiring partner, unless he permits his name to be used by the old firm, although he gives no notice whatever. But, in this remark, he goes somewhat beyond the prevailing authorities. And, in his note to the passage, he seems to apply his rule only to new customers who do not know who were the old partners, or who had no reason to believe the retiring partner to have been and still to be one. And such new customers could not, of course, hold a retiring partner. A considerable lapse of time between the retirement, and the contracting of the new debt, would, of course, go very far to show that it was

v. Fox, 38 Penn. 214; Vernon *v.* Manhattan Co., 17 Wend. 526, 22 id. 183; Watkinson *v.* Bank of Penn., 4 Whart. 482; Mitchum *v.* Bank of Ky., 9 Dana, 166; Mauldin *v.* Bank of Mobile, 2 Ala. N. S. 502; Coddington *v.* Hunt, 6 Hill (N. Y.), 595; Goddard *v.* Pratt, 16 Pick. 431, 434; *Ex parte* Burton, 1 Gill & J. 207; *Ex parte* Leaf, 1 Deacon, 176; Shurlds *v.* Tilson, 2 McLean, 458; Prentiss *v.* Sinclair, 5 Vt. 149; Pitcher *v.* Barrows, 17 Pick. 365.

(*s*) Parkin *v.* Carruthers, 3 Esp. 248; Gorham *v.* Thompson, Peake, 42; Anderson *v.* Weston, 6 Bing. N. C. 296; Graham *v.* Hope, Peake, 154; Bernard *v.* Torrance, 5 Gill & J. 383; Lucas *v.* Bank of Darien, 2 Stewart, 280; Amidown *v.* Osgood, 24 Vt. 278; Burgan *v.* Lyell, 2 Mich. 102; Johnson *v.* Totten, 3 Cal. 343; Davis *v.* Allen, 3 Comst. 168; Princeton Turnpike Co. *v.* Gulick, 1 Harr. 161; Clapp *v.* Rogers, 2 Kern. 283; Magill *v.* Merrie, 5 B. Mon. 168; Simonds *v.* Strong, 24 Vt. 642.

(*t*) Minnit *v.* Whinnery, 5 Bro. P. C. 489, 2 id. (Dublin ed.) 323; Abel *v.* Sutton, 3 Esp. 108; Wrightson *v.* Pullan, 1 Stark. 375, called Wright *v.* Pulham, 2 Chitty, 121; Kilgour *v.* Finlyson, 1 H. Bl. 155; Nott *v.* Downing, 6 La. 680; Lansing *v.* Gaine, 2 Johns. 300; Shurlds *v.* Tilson, 2 McLean, 458; Mowatt *v.* Howland, 3 Day, 353; Taylor *v.* Young, 3 Watts, 339. [Other circumstances may go to the jury as the equivalent of public advertisement, in a newspaper, — such as change in the firm name, notoriety of the dissolution, remoteness of the residence of the new customer, and the like. Lovejoy *v.* Spafford, 93 U. S. 430. See also Deering *v.* Flanders, 49 N. H. 225.]

not, or should not have been, contracted on the credit of the retiring partners. (*u*)

Notice is intended to give knowledge; and therefore knowledge, however acquired, generally renders notice unnecessary, and protects a retiring partner who has done nothing. (*v*) Whether a person has actual knowledge of a dissolution, is a question of fact for the jury, and not of law for the court. (*w*) But a partner who * actually retires as to * 414
all his rights and interests may consent to leave his name in the firm, or to a use of it by the old partners; and, while he thus consents, even by his silence alone, if he knows it, he does not retire as to his responsibilities. (*x*) And a

(*u*) See Merrit *v.* Pollys, 16 B. Mon. 355. See *post*, p. * 418.

(*v*) Hart *v.* Alexander, 2 M. & W. 484; Prentiss *v.* Sinclair, 5 Vt. 149; Martin *v.* Walton, 1 McCord, 16.

(*w*) Deford *v.* Reynolds, 36 Penn. St. 325; Hart *v.* Alexander, 2 M. & W. 484; Hutchins *v.* Sims, 8 Humph. 423; Merrit *v.* Pollys, 16 B. Mon. 355. In Deford *v.* Reynolds, *supra*, A. & B., under the style of A. & Co., had done business for some time with C. & Co. In April, 1853, B. retired. Prior to this time, all drafts drawn by C. & Co. were upon the firm of A. & Co., and their letters were so addressed. But, from the time of the dissolution, C. & Co. drew on A. alone, and their letters were addressed to him alone. Their accounts were, however, kept with A. & Co. until December, 1853; and their clerk testified that he did not know of the dissolution until this time. The jury found that C. & Co. were ignorant of the dissolution; and the court refused to set aside the verdict, although not satisfied with it.

In Irby *v.* Vining, 2 McCord, 379, it is said to be sufficient evidence of knowledge, if such circumstances be proved as to leave no rational doubt that the party knew of the dissolution. [Actual notice is necessary to persons theretofore dealing with the firm. Denman *v.* Dosson, 19 La. Ann. 9; Zollar *v.* Janvrin, 47 N. H. 324; Kirkman *v.* Snodgrass, 3 Head (Tenn.), 370; Austin *v.* Holland, N. Y. Ct. of App. 16 Alb. L. J. 36. Only those who have *habitually* dealt with a firm are entitled to actual notice. A single transaction does not amount to habitual dealing. Merritt *v.* Williams, 17 Kan. 287; Clapp *v.* Rogers, 12 N. Y. 283. Actual knowledge, however obtained, is notice. Davis *v.* Keyes, 38 N. Y. 94; Young *v.* Tibbetts, 32 Wis. 79; Deering *v.* Flanders, 49 N. H. 225. See also Tudor *v.* White, 27 Tex. 584. And the burden of proof of notice is on the partner denying liability on account of dissolution. Kenney *v.* Atwater, 77 Penn. St. 34. It may be inferred from circumstances; but publication in two newspapers, neither of them published in the place where the creditor resides or taken by him, is insufficient. Howell *v.* Adams, N. Y. Ct. of App., 4 N. Y. Weekly Dig. 164. Perhaps, if the papers were regularly sent to the creditor, the notice would be sufficient. Roberts *v.* Spencer, Sup. Jud. Ct. Mass., March, 1877.]

(*x*) A person who continues to act as a partner after dissolution, is liable as a partner. Emmet *v.* Butler, 7 Taunt. 599; Mulford *v.* Griffin, 1 Fost. & F. 145; Fuldo *v.* Griffin, id. 147; Ketcham *v.* Clark, 6 Johns. 144. So it is generally *held* that a person allowing his name to remain is liable. Parkin *v.* Carruthers, 3 Esp. 248; Williams *v.* Keats, 2 Stark. 290; Dolman *v.* Orchard, 2 Car. & P. 104;

customer who knows that he has retired as to his interests, but has no notice, and has no notice of the retirement, may be led to believe that notice is withheld because the partner intends to continue responsible. And, if he is justified in this belief by all the circumstances, however erroneous it might be, the mere knowledge, on his part, of the retirement, without notice, would not prevent him from holding the partner. (*y*) If one of several partners retires, and notice thereof is given, but the business continues to be carried on as before, those partners, as to whom no notice is given, will be presumed to hold the same relation to the concern as before. (*z*)

Whether there has been a previous dealing with the firm, — that is, whether a plaintiff had a right to require one kind of notice, or only another, — is sometimes a difficult question.

* 415 That the dealing must be with the firm directly, and not merely the purchase of their paper for a third person, is, we think, evident. (*a*) A mere purchase for cash would probably not be enough. (*b*) But selling goods to a firm and delivering them, to be paid for afterwards, although no term of credit is fixed, would make the sellers dealers, and entitle them to notice. (*c*) So a bank which has previously been in the habit of discounting notes and bills for a firm, (*d*) or a person who has been in the habit of indorsing for a

Stables *v.* Eley, 1 id. 614; Amidown *v.* Osgood, 24 Vt. 278. But see Jenkins *v.* Blizard, 1 Stark. 418.

In Conro *v.* Port Henry Iron Co., 12 Barb. 56, the court said: "The continuance of the same sign on the store, the form of the bills against the company, not objected to, of notes and receipts given, of notices posted in the name of the company, contracts made in the company name by the president and other officers, and other acts and declarations of the officers, indicated a continuance of the business on the responsibility of the company."

(*y*) Thus, in Brown *v.* Leonard, 2 Chitty, 120, it is *held*, that a partner who gives notice that he has ceased to be a partner, but who has said that his name is to continue for a certain time, is liable to a person to whom such notice is given, for the acts of the other partners.

(*z*) Howe *v.* Thayer, 17 Pick. 91.

(*a*) Hutchins *v.* Bank of Tennessee, 8 Humph. 418. See Grinnan *v.* Baton Rouge Mills Co., 7 La. Ann. 638.

(*b*) *Dictum* in Clapp *v.* Rogers, 2 Kern. 283.

(*c*) Clapp *v.* Rogers, 2 Kern. 283.

(*d*) Hutchins *v.* Bank of Tennessee, 8 Humph. 418. See also City Bank of Brooklyn *v.* McChesney, 20 N. Y. 240; Id. *v.* Dearborn, id. 244; National Bank *v.* Norton, 1 Hill, 572. In Vernon *v.* Manhattan Co., 17 Wend. 524, 22 id. 183, the note was the last of a series of accommodation notes. The first note was discounted by the defendants, and renewed several times. *Held*, that the defendants were dealers.

firm, (*e*) or of lending his note to it for its benefit, (*f*) is a dealer. As a general rule, previous dealing, which would entitle a person to notice, must be during the continuance of the partnership; but in one case where goods had been delivered after dissolution, but before any publication of it, at the store formerly occupied by the old firm, in which the retiring partner still remained, though in the capacity of a clerk, and the old sign was up, it was *held* that the seller was to be considered a dealer, and entitled to notice. (*g*)

The same principle which makes this distinction between new customers and old customers, protects a dormant or unknown partner who retires and gives no notice whatever. He was bound for any obligations incurred by the firm while he was in it, because he was then a partner in fact, and not because he was supposed to be one: in other words, he was bound because of his participation in the business and profits, and not because the creditors of the firm became so on his credit. When he leaves the firm, therefore, all the reason for holding him responsible expires; and he is not obliged to give any notice, or take any step to withdraw a credit which never existed. (*h*) A dormant partner * is, however, *416 liable for the whole of a debt contracted during his partnership, just as any other partner is. And, if he is known to any customer, so far as relates to that customer he is not a dormant or unknown partner, and, therefore, notice should be given to that customer. Whether the customer was ignorant of the partnership or not, is a question of fact, and sometimes is a difficult one. But a knowledge on his part must be clearly shown, to entitle him to notice, if the partner were generally unknown. (*i*) As the fact of the partnership may have been

(*e*) Hutchins *v.* Sims, 8 Humph. 423.

(*f*) Hutchins *v.* Hudson, 8 Humph. 426.

(*g*) Amidown *v.* Osgood, 24 Vt. 278. In Wardwell *v.* Haight, 2 Barb. 549, a person who had two previous dealings with a firm was held entitled to actual notice.

(*h*) Scott *v.* Colmesnil, 7 J. J. Marsh. 416; Kelley *v.* Hurlburt, 5 Cow. 534; Evans *v.* Drummond, 4 Esp. 89; Armstrong *v.* Hussey, 12 Serg. & R. 315; Benton *v.* Chamberlin, 23 Vt. 711; Kennedy *v.* Bohannon, 11 B. Mon. 120; Ayrault *v.* Chamberlin, 26 Barb. 89; Warren *v.* Ball, 37 Ill. 76; Ellis *v.* Bronson, 40 Ill. 455.

(*i*) Carter *v.* Whalley, 1 B. & Ad. 11; Farrar *v.* Deflinne, 1 Car. & K. 580; Edwards *v.* McFall, 5 La. Ann. 167.

accidentally divulged without the knowledge or intention of the dormant partner himself, it would always be wise to guard against a danger of this kind, by giving the usual notice. The question has arisen, whether, if A., B., and C. are in business, under the firm and style of A., B., & Co., and C. retires, he is bound to give notice to dealers with the firm who have no knowledge that he is a partner. We exhibit the present state of the authorities in our note. (*j*) In Scotland, a dormant partner must give notice of dissolution, as well as an ostensible one. (*k*)

* 417 * An existing contract may contemplate future payments to any extent; and, if this be a specialty, as a lease to the partners by name, the retirement or dissolution or settlement will in no way exonerate the retiring partner, or any one who is lessee; nor will any thing else which would not operate his discharge, if there were no partnership between the lessees. In such a case, notice to the lessor of his retirement would not discharge him; nor would receiving rent by the lessor from the remaining partners. And the same liability exists as to the contracts generally, if executory.

(*j*) In Edwards *v.* McFall, 5 La. Ann. 167, the defendant was a partner of A. & Co. It was contended that, as his name did not appear in the style of the firm, he was a dormant partner. But the court said: "We are not prepared to say that a person can be styled a dormant partner who enters into a partnership with A., under the style of A. & Co. The words '& Co.' hold out to the world that some one else is concerned beside A. The term 'dormant' seems more properly applicable to the case of a party associating himself in business with A., who transacts the business in his (A.'s) sole name." See Mitchell *v.* Dall, 2 Harris & G. 159, 171. Where A. & B. were in business under the name of A. & Co., and a person dealing with the firm did not know that B. was in the firm, it was *held* that B. was not a dormant partner. Deford *v.* Reynolds, 36 Penn. St. 325. See also Western Bank of Scotland *v.* Needell, 1 Fost. & F. 461. A similar rule is laid down in Goddard *v.* Pratt, 16 Pick. 428; but the case of Grosvenor *v.* Lloyd, 1 Metc. 19, has been thought to countenance the doctrine that an unnamed partner in such a firm would not be bound to give notice in such a case. This inference does not necessarily follow, however; because the ruling of the court below, upon which the case came up, was somewhat peculiar, and did not present this precise question. The court below had instructed the jury that a secret partner was liable after his withdrawal, if no notice of the dissolution was given. The effect of that instruction was to make the partner designated under the "Co." secret; and the higher court, by ordering a new trial, may perhaps be taken to have repudiated that doctrine, and to have sustained the contrary doctrine of Goddard *v.* Pratt. See also Benton *v.* Chamberlin, 23 Vt. 711; Heath *v.* Sansom, 4 B. & Ad. 172; Carter *v.* Whalley, 1 B. & Ad. 11; Bernard *v.* Torrance, 5 Gill & J. 583.

(*k*) Hay *v.* Mair, Ross on Part. 639.

The question, whether notice has been given, or, if given generally, whether it was brought home to the knowledge of a customer, is governed, in the case of a retiring partner, by the rules applicable to a question of notice in other cases. It is usually a mixed question of law and fact; although, if the facts are found, the reasonableness of the notice is properly a question of law only. In England, or at least in London, a usage sanctioned by the courts, requires that notice of retirement and dissolution should be given in a newspaper, published in London, under the name of "The London Gazette." (*l*) There, also, all bankruptcies are published; and it is a cant phrase for becoming a bankrupt, that a party "finds himself in the 'Gazette,'" No such usage is known here, and would be impossible as to any one paper for the whole nation; but it might, perhaps, usefully obtain as to some one paper in each of our principal commercial cities. As the law stands, however, the party giving notice by advertisement may take his choice of newspapers. If, however, he selected one which was very obscure and unknown, or had but little circulation among merchants, it might be a fact which would lead a court or jury towards the conclusion that the party intended to satisfy the letter of the law, but not its spirit, and to withhold notice rather than to give it; and, of course, such a notice would not be deemed "reasonable" by the court. A similar remark may be made, but with less force, perhaps, as to the number of times the advertisement was published, and even as to the place which
* it occupied in the newspaper. There can be but one * 418
general rule applicable to all these questions; and that is, that the retiring partner cannot have the benefit of the notice, unless he shows that it was such reasonable and sufficient notice as the usage of merchants requires, (*m*) or brings

(*l*) In Troughton *v.* Hunter, 18 Beav. 470, the partnership had been dissolved by judicial decree. One of the partners refused to sign the notice of the dissolution which had been prepared for publication in "The London Gazette," and it appeared that it was the usage of that paper not to publish any notice unless signed by all the partners. The court ordered the partner to sign the notice.

(*m*) In Grinan *v.* Baton Rouge Mills Co., 7 La. Ann. 638, the business of making bricks and sawing lumber was carried on at Baton Rouge. The members of the firm all lived in New Orleans, where they had an office, kept by an agent. It was *held* that notice of dissolution published in a paper at Baton Rouge was not sufficient to exonerate those known to be partners as to persons residing at New Orleans, who

home actual knowledge of it to the customer. For, even if he tried to prevent the notice from being known, he will still have the full benefit of it so far as it was known. If the retiring partner does not publish the fact in any newspaper, the mere notoriety of it will seldom or never protect him. (*n*) It is, however, always possible that this notoriety may be so extreme, and so connected by circumstances with an individual customer, that both court and jury would regard it as dispensing with special notice. (*o*) And a sufficient lapse of time since the retirement might supply the want of notice. (*oo*)

The taking a note of one partner (the firm having been dissolved two years before), signed with the firm name, and the words added, "in liquidation," would be evidence from which the jury might infer knowledge. (*p*) And a change of partnership in a banking-house is sufficiently notified to the
*419 customers of the * house by a change in the printed cheques. (*q*) So a change in a name painted on a counting-house, and circulars sent to old correspondents, but no public notice given, is sufficient notice to the world. (*r*)

had had no previous dealings with the firm. See also Deford *v.* Reynolds, 36 Penn. St. 325. In Wardwell *v.* Haight, 2 Barb. 549, the dissolution of a firm doing business in Rochester was concealed fifteen months; and notice then was published in Rochester six days before goods were purchased in New York on the credit of the firm. The court considered the sellers as dealers, and therefore entitled to actual notice; but said, if they had not been, this notice would have been insufficient. It was also said that a notice must be public and notorious, so as to put the public on its guard. See Bank of the Commonwealth *v.* Mudgett, 45 Barb. 663.

(*n*) Pitcher *v.* Barrows, 17 Pick. 361; City Bank of Brooklyn *v.* McChesney, 20 N. Y. 240; Gorham *v.* Thompson, Peake, 42. The testimony of a witness, that he had notice of the dissolution of a partnership at a particular time, cannot be given in evidence in a suit between others, in which the dissolution of the partnership at that time becomes material. Shaffer *v.* Snyder, 7 Serg. & R. 503.

(*o*) Where a witness testified that he had given notice of the retirement of a partner, and of the general dissolution of the partnership, and that he was "confident that all the neighborhood were notified in two days," and on cross-examination was asked whether he gave such notice to the other creditors as he had testified he gave to the one in question, and he said he had, and gave the names of the persons, — it was *held* that it was competent to call the persons named, and to prove that such notice had not been given them; but that it was not competent for the other side to call any of the persons named to prove that they had received such notice. Howe *v.* Thayer, 17 Pick. 91.

(*oo*) Farmers' Bank *v.* Green, 1 Vroom, 316.

(*p*) Merrit *v.* Pollys, 16 B. Mon. 355.

(*q*) Barfoot *v.* Goodall, 3 Camp. 147.

(*r*) M'Iver *v.* Humble, 16 East, 169.

But a mere change of name is not always enough; (*s*) nor a change of pursuits, or a removal from the state of one partner; (*t*) nor is the incorporation of the firm; (*u*) or the fact that a deed of assignment, constituting a dissolution, was put on record. (*v*) If the notice was only by advertisement, it must go further. It has been *held* that proof that the customer regularly received the newspaper was sufficient. (*w*) But the prevailing rule now seems to be, — at least in this country, where, as has been said, we have no one newspaper in which merchants may expect to find all information of this kind, — that it is not enough, of itself, to prove that the very number of the paper containing the advertisement was delivered at his house, or even traced to his hand. (*x*) And, in point of fact, the multiplication of newspapers, to say nothing of their size, seems to forbid all reasonable inference that he who takes a newspaper, or even reads in it, reads the whole of it, or becomes apprised of all the facts stated in it. But, if it could be shown that the customer's attention was, in any * especial way, drawn to the advertisement, — even, * 420 perhaps, by being placed prominently before him, — the evidence might be thus made sufficient. But our courts seem to

(*s*) As if a firm which consisted of A., B., & C., doing business under the name of A. & B., on the retirement of C. and of A., should do business under the style of B. & D., even if the fact of the change of name were known, it would not be equivalent to notice of the retirement of C., especially if the firm was carried on under a more general designation which remained unchanged. Howe *v.* Thayer, 17 Pick. 91.

(*t*) Lucas *v.* Bank of Darien, 2 Stew. 280.

(*u*) Goddard *v.* Pratt, 16 Pick. 432.

(*v*) Pitcher *v.* Barrows, 17 Pick. 361.

(*w*) For the rule in England, see Godfrey *v.* Turnbull, 1 Esp. 371; Wrightson *v.* Pullan, 1 Stark. 375, called Wright *v.* Pulham, 2 Chitty, 121; Godfrey *v.* Macauley, 1 Peake, 155; Newsome *v.* Coles, 2 Camp. 617; Norwich Nav. Co. *v.* Theobald, Moody & M. 151. But, in respect to persons who have been dealers with the firm, notice in the "Gazette" is not sufficient. Graham *v.* Hope, Peake, 154. In Jenkins *v.* Blizard, 1 Stark. 418, it is not stated expressly whether the party sought to be charged with notice was a previous dealer or not; but it would seem that he was, from the concluding remarks of Lord Ellenborough. Notice was published in the "Gazette," and once in the "Morning Chronicle." This last paper was taken by the party sought to be charged *Held*, that this was evidence to go to the jury of knowledge of the dissolution.

(*x*) Vernon *v.* Manhattan Co., 17 Wend. 526, 22 id. 192; Boyd *v.* Cann, 10 Md. 118; Pope *v.* Risley, 23 Mo. 185; Watkinson *v.* Bank of Penn., 4 Whart. 482; Hutchins *v.* Bank of Tenn., 8 Humph. 418; White *v.* Murphy, 3 Rich. 369. But see Bank of South Carolina *v.* Humphreys, 1 McCord, 388.

be tending — wisely, as we think — to the requirement of personal notice, by circulars, to all the customers of the firm, if the old name be retained.

Some question may arise as to the person to whom notice should be given. If given to one of a partnership, in this as in all other cases of *bonâ fide* notice all are certainly bound. (*y*) So, if to an agent, the principal is bound. (*z*) If to a stockholder in a corporation, (*a*) — a bank, for example, — it is no notice to the bank, unless it can be carried further, and shown to have reached those who were intrusted with its management. It has been *held*, that casual notice, by an advertisement, reaching a director, did not bind the bank. (*b*) And, upon the whole, the actual practice of the country may supply sufficient reason for the distinction. But if a notice were given to a director, expressly for the bank, and to be communicated to the board or cashier and acted upon, this must be sufficient. (*c*) We should doubt, however, whether notice to a stockholder, with a distinct request that he should communicate the fact to the directors or officers, would bind the bank, unless this communication was made; because a stockholder is under no obligation to communicate such information, and has no official authority to receive it. (*d*) It may be considered as a general rule, that, where it is necessary to give notice, it is not sufficient that the necessary steps for this purpose were taken, if notice was not received. (*e*)

The principle, that, after a partnership is dissolved, one partner dealing with a person having no notice of the dissolution may bind his late copartner, applies only to transactions in the usual course of the firm's business. (*f*)

(*y*) Bignold *v.* Waterhouse, 1 Maule & S. 249; *Ex parte* Waithman, 1 Mont. & A. 374; Haywood *v.* Harmon, 17 Ill. 417; Bouldin *v.* Paige, 24 Mo. 594. See Lansing *v.* M'Killup, 7 Cow. 416; Powell *v.* Waters, 8 id. 670; Watson *v.* Welles, 5 Conn. 468.

(*z*) Page *v.* Brant, 18 Ill. 37.

(*a*) 1 Pars. on Cont. (5th ed.) 77 and notes.

(*b*) National Bank *v.* Norton, 1 Hill, 572. In Lucas *v.* Bank of Darien, 2 Stew. 280, the fact that one partner after dissolution became a director in a bank was not notice to the bank of the dissolution. And see preceding note.

(*c*) National Bank *v.* Norton, 1 Hill, 578; Bank of the United States *v.* Davis, 2 id. 264.

(*d*) See cases in preceding notes.

(*e*) Johnson *v.* Totten, 3 Cal. 343.

(*f*) Whitman *v.* Leonard, 3 Pick. 177.

3. *When the Retiring Partner is discharged by the Creditors.*

* A retiring partner is, as we have seen, liable for the *421 existing debts of the firm, in precisely the same way and to the same extent as before he left it: and yet it is very common for the partners to agree that they who remain, perhaps with the new ones who come in, shall pay all the debts; and the retiring partner, as a consideration for this agreement, gives up or leaves behind him a proportionate part of the joint property. Such an agreement is perfectly valid between the partners; but has no effect at all upon the creditors, unless they become parties to it. (*g*) It follows, therefore, that the creditors of the firm may not only include the retiring partner in any action against the firm, but may satisfy an execution against the firm from his property, as freely as from that of any remaining partner. (*h*) But, when they have done so, the retiring partner has his action against the remaining partners, on their contract to pay that debt. It is usual to add, in the bargain between the partners, a clause of indemnity; but whether they do or do not promise to hold him harmless, if they promise to pay the debt, and he pays it, he has his action. (*i*)

If, however, the creditors become parties to this agreement, for consideration, they are of course bound by it; and then they cannot sue the retiring partner. In such case, something like the novation of the civil law has taken place. A debt due from the whole firm has been discharged, and a new debt from a part of the firm has been created. The old debt has been paid by the new one. But there must be some consideration for the release of the retiring partner. In almost all cases where the creditor agrees to this, there is some reason for it in fact, which serves as a consideration. Either the retiring partner gives up something because of the assent of the creditor, or the creditor gains something in time, or in busi-

(*g*) Harris *v.* Lindsay, 4 Wash. C. C. 98, 271; Kirwan *v.* Kirwan, 2 Cromp. & M. 617.

(*h*) Lodge *v.* Dicas, 3 B. & Ald. 611; per DeGrey, C. J., 2 W. Bl. 947, and Ld. Eldon, 6 Ves. 119; Harries *v.* Jameson, 5 T. R. 556; Wooley *v.* Kelly, 1 B. & C. 68. And see Allen *v.* Wells, 22 Pick. 450.

(*i*) Hobart *v.* Howard, 9 Mass. 304; Brewer *v.* Worthington, 10 Allen, 329. See Thurber *v.* Corbin, 51 Barb. 215.

*422 ness, or in some other way; and there *are few cases in the books, and few we apprehend in practice, in which a creditor, who agrees with partners that one of them shall retire and be released from his debt on the engagement of the others to pay it, is afterwards permitted to sue this partner. It is seldom, of course, that such bargains are made in cases of insolvency; for the obvious futility of it, and entire absence of motive for it, or effect from it in such a case, would prevent an attempt to make or carry out an agreement of this kind by an insolvent firm. And, if the firm be solvent, no harm is done to the creditor by limiting his choice among debtors, all or any of whom can pay him.

It is said that the adequacy of the consideration cannot be inquired into. (*j*) And, if a creditor of a firm contracts or agrees with a new firm to take their security in discharge of that of the old, the retiring partner is discharged from any liability to pay the debt; and whether such an agreement has taken place is a question of fact for the jury. (*k*) To discharge the retiring partner, however, it is not sufficient to take a new security; but there must be an agreement to discharge him from the liability of the old firm. (*l*)

(*j*) Lyth *v.* Ault, 7 Exch. 667, 11 Eng. L. & Eq. 580, per Pollock, C. B.

In Lodge *v.* Dicas, 3 B. & Ald. 611, a creditor of a firm, on its dissolution, agreed to look only to one partner. *Held*, that the agreement was void for want of consideration. See also David *v.* Ellice, 5 B. & C. 196; Thomas *v.* Shillibeer, 1 M. & W. 124, and Wildes *v.* Fessenden, 4 Metc. 12, where this question is discussed at length. Lodge *v.* Dicas is, however, no longer authority in England. In Lyth *v.* Ault, 7 Exch. 667, 11 Eng. L. & Eq. 580, *debt* was brought against A. & B. A. pleaded that the action was for goods sold to A. & B. as partners; that afterwards A. being about to retire, and the business to be carried on by B. alone, of which the plaintiff had notice, an agreement was made between the plaintiff and defendant, by which the plaintiff was to be paid 12*l.* in part payment of her debt, and the plaintiff was to abandon her claim against A. and look to B. alone. The jury having found the issue of fact in favor of the defendant, a motion was made for judgment for the plaintiff *non obstante veredicto*, on the ground that there was no new consideration for the agreement. Parke, B., said that Thompson *v.* Percival, 5 B. & Ad. 925, substantially overruled Lodge *v.* Dicas, 3 B. & Ald. 611. Pollock, C. B., said, that it was not easy to make a distinction between the case at bar and Lodge *v.* Dicas; but in that case the defendant was not proved to have known of the agreement of the plaintiff to take the liability of the other partners. Martin, B., said: "I think that Lodge *v.* Dicas is overruled, and it is better to say so than to attempt to distinguish between the cases."

(*k*) Harris *v.* Farwell, 15 Beav. 31, 15 Eng. L. & Eq. 70; Thompson *v.* Percival, 5 B. & Ad. 925.

(*l*) Harris *v.* Farwell, 15 Beav. 31, 15 Eng. L. & Eq. 70; Bedford *v.* Deakin, 2 B. & Ald. 210.

*It is quite seldom that creditors of a firm assent to *423 such an arrangement expressly and directly, but it is very common for them to do so by implication; and numerous cases turn upon the question, What circumstances imply such assent on the part of the creditors? The cases we cite will show that the courts construe with some liberality the question of assent; and that of consideration, with so much that it seems to be now almost implied in the assent. (*m*) But a creditor's mere transfer in his ledger of an account against a firm, to the private account of one partner, without the knowledge of the firm, does not preclude the creditor from suing the firm. (*n*)

If the creditor has no security, and no paper evidence of his debt from the firm, and, after the partner retires, he accepts from the new firm, with knowledge of the retirement, the security or paper of the new firm, — this would seem to be not only an assent on his part, but an assent on consideration; for the acquiring either of additional security, or of paper which he may, by discount, at once convert into money, is consideration enough for the promise implied in his assent, even though there is no new partner in addition to the old in the new firm. (*o*)

If he has securities from the old firm, and gives them

(*m*) See Hart *v.* Alexander, 2 M. & W. 484; Harris *v.* Lindsay, 4 Wash. C. C. 98, 271; Deland *v.* Amesbury Man. Co., 7 Pick. 244.

(*n*) Barker *v.* Blake, 11 Mass. 16. See also Armsby *v.* Farnam, 16 Pick. 318; Averill *v.* Lyman, 18 id. 351; Baring *v.* Crafts, 9 Metc. 380.

(*o*) Evans *v.* Drummond, 4 Esp. 92; Reed *v.* White, 5 id. 122; Thompson *v.* Percival, 5 B. & Ad. 925; Sheehy *v.* Mandeville, 6 Cranch, 264; Stephens *v.* Thompson, 28 Vt. 77; Isler *v.* Baker, 6 Humph. 85. In this latter case, however, the plaintiff had taken a note signed by the firm name, which the court held good as against the signer, but not as against the estate of the deceased partner; an inquisition of lunacy having been found against the latter, after the goods were bought by the firm, but before the firm note was given. A joint action was brought by the promisee against the administrator of the deceased and the partner who gave the note, and there was a count for the note and one for goods sold and delivered. The court *held* that the inquisition of lunacy found against the partner, *ipso facto*, dissolved the partnership; but that the note, being good against the giver, discharged the debt of the firm on account; and, a verdict having been found against the joint defendants, ordered a new trial.

In Harris *v.* Lindsay, 4 Wash. C. C. 98, 271, A. & B. were in partnership, and A. retired, and B. went on with another person; and afterwards this firm was dissolved and another formed, which was also dissolved. The amount due from these three firms to a creditor of all of them was consolidated, and three notes given for the amount, signed by B. *Held*, that A. was thereby discharged.

*424 up, and * receives from the new firm what is only the same, excepting that the paper loses one name and gains another, being that of a present instead of a past firm,—here there is undoubtedly consideration enough, whether the new name be better or worse, commercially speaking, than the name that is lost. (*p*) And if the old security is given up for the new, it seems that the old is so effectually destroyed that, if the creditor afterwards returns the new to the remaining partner or partners, and receives from them the old, this will not revive the obligation of the retiring partner. (*q*)

If he takes new security, agreeing to hold the retiring partner only as surety for the debt, there must be some consideration, even for this modified discharge; but if there is one, or any thing which can be called one, then the retiring partner will be held only as surety, and not as a joint debtor. He will, therefore, be discharged by any indulgence to the remaining partners, who are the principal debtors, which would suffice to discharge any surety; and the general rule here is, that mere delay in calling for the debt does not discharge the surety; (*r*) nor even a promise of delay, if it be not so far binding as to estop the creditor from a suit against the new firm. (*s*) But, if it would have this effect, then it injures the guarantor, because he can no longer secure himself by paying the debt and suing for it in the name of the creditor; and, therefore, by such indulgence he is discharged. (*t*)

If the creditor takes new security, retaining the old, without any specific arrangement, it might be thought that such a transaction implied precisely the change above spoken of; that is, an acceptance of the new firm, who give this security, as principal debtors, and of the former partner as their surety. It seems

(*p*) Bedford *v.* Deakin, 2 B. & Ald. 210; Hart *v.* Alexander, 2 M. & W. 484; Harris *v.* Farwell, 15 Beav. 31, 3 Eng. L. & Eq. 70; Yarnell *v.* Anderson, 14 Mo. 619. See also Sheehy *v.* Mandeville, 6 Cranch, 264; Stephens *v.* Thompson, 28 Vt. 77; Isler *v.* Baker, 6 Humph. 85.

(*q*) Arnold *v.* Camp, 12 Johns. 409.

(*r*) That mere delay to sue a principal does not discharge a surety, see Freeman's Bank *v.* Rollins, 13 Me. 202; Townsend *v.* Riddle, 2 N. H. 448; Strong *v.* Foster, 17 C. B. 201; Hunt *v.* Bridgham, 2 Pick. 581. See also 2 Pars. on Cont. (5th ed.) 26, note (*f*) and cases cited.

(*s*) In such a case, the agreement is of no effect. Reynolds *v.* Ward, 5 Wend. 501; Hogaboom *v.* Herrick, 4 Vt. 131; Creath *v.* Sims, 5 How. 192.

(*t*) Oakelley *v.* Pasheller, 4 Clark & Fin. 207, 10 Bligh, N. S. 548.

rather to be regarded, however, as not affecting the liability of the *retiring partner at all. And the creditor *425 in such case retains the liability of the retiring partner, although that partner did not himself know that the old securities were retained. (*u*)

Generally, if a person having a demand against a firm gives up the evidence of it to one of the partners, that he may collect it from the others, and thus enables him to represent to the others that he has paid the debt, and they settled with him on this basis, we should not consider the partners so settling as liable to the creditor; but if the partner merely says to them that he has the evidence of the debt, and does not produce it, and they settle with him as above, they do it at their own risk. (*v*)

It is quite clear, that if the creditor, when he receives the new securities, expressly reserves all his rights against the old firm or retiring partner, he retains them unimpaired. (*w*) And the question always exists, where there is neither express reservation nor express release, whether the whole transaction, illustrated by such circumstances as indicate the intention of the parties, falls within one or other of the principles above stated.

Frequently, the new firm goes on in its regular business, the accounts of the customers are transferred from the old to the new, and the customers, knowing the retirement and change of parties and transfer of accounts, say nothing, but continue their dealings with the new firm; perhaps depositing and drawing, or buying and selling, or receiving interest and settling accounts, all just as before, taking no particular notice of the change. The question then occurs, What is the legal significance and effect of such conduct? and it seems to be well settled that the mere receiving of interest from the new firm will not discharge the old; (*x*) and although the transferring the old

(*u*) See Harris *v.* Lindsay, 4 Wash. C. C. 271, and cases cited in note (*v*), *infra*.

(*v*) Featherstone *v.* Hunt, 1 B. & C. 1130.

(*w*) Bedford *v.* Deakin, 2 Stark. 178, 2 B. & Ald. 210; Yarnell *v.* Anderson, 14 Mo. 619; Smith *v.* Rogers, 17 Johns. 340.

(*x*) In Gough *v.* Davies, 4 Price, 200, it was *held* that a person depositing money with his bankers, and taking their accountable receipts, does not, by continuing to leave his money in the

*426 account to the *new firm is not necessarily an adoption by the creditor of the new firm as his sole debtors, (*y*) yet this fact, together with the other circumstances of the case, may be evidence from which a jury would be authorized to find that the creditor had impliedly assented to the discharge of the old firm. (*z*) An eminent English judge, speaking of a case in which the retiring partner was held, says: "The court was substituted for a jury in that case; and I very much doubt whether twelve merchants would have determined it as the court did." (*a*) And he appears to think that what the merchants would do, that the court should do.

In respect to the burden of proof, it has been *held*, that when the liability at a given time of all the partners is proved, the burden is on those of them who seek to escape continued liability, to show a cessation. (*b*)

In a few cases, the question has arisen, as to the continued liability of a retiring partner for money applied to partnership uses with the knowledge of the partners, by one of the

bank after the dissolution of the original firm and the constitution of a new one, which consists of some members of the old bank and of other persons, discharge the partners who have retired, although he receives interest regularly from the new firm, gives them no notice, and continues to transact business with them for four years and until their insolvency. In Harris *v.* Farwell, 15 Beav. 31, 15 Eng. L. & Eq. 70, a customer of a banking firm had deposited money in it on interest. On the death of one of the firm, the business was carried on by the survivors and a new member. A. received interest from the new firm until their bankruptcy, and then made an affidavit that the new firm was indebted to him for money had and received by them to his use. *Held*, that the fact that interest was paid was not conclusive, because it might have been paid by them as agents, and that the affidavit could not be construed as an agreement to discharge the old firm. See also Daniel *v.* Cross, 3 Ves. 277; Devaynes *v.* Noble, 1 Meriv. 529, 566; Blew *v.* Wyatt, 5 Car. & P. 397.

(*y*) See *Ex parte* Appleby, 2 Deacon, 482; Kirwan *v.* Kirwan, 2 Cromp. & M. 617.

(*z*) See Thompson *v.* Percival, 5 B. & Ad. 925; Hart *v.* Alexander, 2 M. & W. 483; Brown *v.* Gordon, 16 Beav. 302, 15 Eng. L. & Eq. 340. In Benson *v.* Hadfield, 4 Hare, 32, there is a *dictum*, that where a partner retires from a firm, and a customer has notice of his retirement, and afterwards continues his dealing with the new firm, without making any claim on the retired partner, a jury may, from the circumstances, presume that the customer agreed to discharge the retired partner, and to accept the new firm as debtors, instead of the old one. In deciding whether such an agreement ought to be presumed, the nature of the dealings subsequently to the retirement, the form of the accounts rendered, the time elapsing, and other circumstances, are most material.

(*a*) Hart *v.* Alexander, 2 M. & W. 493.

(*b*) Kirwan *v.* Kirwan, 2 Cromp. & M. 617.

partners who had the money in his possession as trust-money. We cannot doubt what the law should be in such cases. In the first place, this is to all intents a borrowing of money by the firm. It may be said, it is a borrowing from one of the partners, and if he agrees with another, who retires, never to call upon him for the debt, there is an end of it. But it is plain that the borrowing * is not — at least in equity, *427 and we think that courts of law would adjudicate such a question on principles of equity — a borrowing from the partner who is trustee, but from the *cestui que trust*, or from the trust-fund. It is scarcely possible that such use of trust-money is legal and proper as against the *cestui que trust*, without his express consent. Nothing is gained, therefore, by showing that the legal estate, and all legal rights, are in the lending partner; for, if he exercises these rights in an illegal way, they who are participant of the wrong cannot be permitted to profit by it. We say, therefore, that a retiring partner should be held for such a debt, unless he show, expressly or by sufficient implication, a receipt or release from the parties who are actually interested in the trust-fund, and are competent to give such release, and who give it for some legal consideration. (*c*) But if a partner holding the money of a stranger, as his agent, puts that money into the firm, this does not make the stranger a partner. (*cc*)

4. *When the Retiring Partner is discharged by Appropriation of Payment.*

The general principles which are applicable to this subject are these: If money is paid, the paying debtor may appropriate it as he will; if he does not, the creditor may; if neither do, the law will appropriate it in such way as will do justice to all parties. (*d*) Of these three rules, the first is clear and

(*c*) Dickenson *v.* Lockyer, 4 Ves. 36; Smith *v.* Jameson, 5 T. R. 601.

(*cc*) Harper *v.* Lampsing, 33 Cal. 650.

(*d*) Simson *v.* Ingham, 2 B. & C. 65; Jones *v.* Maund, 3 Younge & C. Exch. 347; Brazier *v.* Bryant, 2 Dowl. P. C. 477; Chitty *v.* Naish, id. 511; Peters *v.* Anderson, 5 Taunt. 596; Alexandria *v.* Patten, 4 Cranch, 317; Cremer *v.* Higginson, 1 Mason, 338; Franklin Bank *v.* Hooper, 36 Me. 222; Hamilton *v.* Benbury, 2 Hayw. 385; Hargroves *v.* Cooke, 15 Ga. 221; Pennypacker *v.* Umberger, 22 Penn. St. 492; Sneed *v.* Wiester, 2 A. K. Marsh. 277.

unqualified: no doubt exists that one who owes many debts may insist that his payment shall discharge which of them he will; and, if he points it out, the acceptance of the money
* 428 discharges that debt. (*e*) The second may * not be so certain. Some authorities have inclined to require of the creditor an appropriation at the time of payment, saying that, if it be not then appropriated, the law will determine any subsequent appropriation. This is the rule of the civil law. (*f*) But we consider it well settled that this is not the rule of the common law; for although it is clear that a creditor cannot wait until the time of the trial to make his appropriation, (*g*) or, it would seem, until a controversy has arisen, (*h*) yet he is not obliged to make the appropriation immediately, but may wait a reasonable time. (*i*) The reason of the rule would be, perhaps, as well satisfied by saying, that the creditor may make his election and appropriation at any time before a change of circumstances takes place which would vary the rights of the parties, and therefore render an appropriation favorable to the creditor injurious to some one else. (*j*) The

(*e*) Whether the debtor has appropriated the payment or not, is a question of intent for the jury. As to what circumstances will warrant a finding of such appropriation by the debtor, see Tayloe *v.* Sandiford, 7 Wheat. 14; Mitchell *v.* Dall, 2 Harris & G. 159, 4 Gill & J. 361; Fowke *v.* Bowie, 4 Harris & J. 566; Robert *v.* Garnie, 3 Caines, 14; West Branch Bank *v.* Moorehead, 5 Watts & S. 542; Scott *v.* Fisher, 4 T. B. Mon. 387; Stone *v.* Seymour, 15 Wend. 19; Newmarch *v.* Clay, 14 East, 239; Shaw *v.* Picton, 4 B. & C. 715. If the debtor pay with one intent and the creditor receive with another, the intent of the debtor shall govern. Reed *v.* Boardman, 20 Pick. 441. It is not necessary for the debtor who pays money to make a specific appropriation of it at the time of the payment: it is sufficient, if it can be collected from other circumstances, that he intended at the time of payment to appropriate it to a specific purpose. Shaw *v.* Picton, 4 B. & C. 715; Waters *v.* Tompkins, 2 Cromp., M. & R. 723.

(*f*) That this is the rule of the civil law, see Dig. lib. 46, tit. 3, § 1, 3. See also Clayton's Case, Devaynes *v.* Noble, 1 Meriv. 572. In Hill *v.* Southerland, 1 Wash. (Va.) 133, it is said, that it is incumbent on the creditor to make a recent application by entries in his books or papers, and not to keep parties and securities in suspense, changing their situation from time to time, as his interest governed by events might dictate.

(*g*) United States *v.* Kirkpatrick, 9 Wheat. 737.

(*h*) See *dicta* in United States *v.* Kirkpatrick, 9 Wheat. 737, per Story, J.; Fairchild *v.* Holly, 10 Conn. 184, per Williams, J.

(*i*) See Fairchild *v.* Holly, 10 Conn. 184, per Williams, J.; Alexandria *v.* Patten, 4 Cranch, 317; Simson *v.* Ingham, 2 B. & C. 65.

(*j*) In Alexandria *v.* Patten, 4 Cranch, 317, the judge in the court below ruled, that if the debtor at the time of making the payment did not direct to which account it should be applied, then the creditor might imme-

right of an appropriation by the creditor is not conclusively exercised by entries in his books, if these are not communicated to the other party ; (*k*) * but the entries are * 429 decisive of the question, if the charges are made by the consent of all the parties. (*l*)

We apply these principles to the case of a retiring partner, thus: For the debts existing when he retires, he continues responsible ; for new ones, created after his retirement (the requisite notice having been given), he is not responsible ; and when the remaining partner, or the new firm, *pay* money after his retirement, if that is appropriated to the old debts, it relieves the retiring partner ; if to the new debts, the old debts are not paid, and the retiring partner remains responsible.

Now, the firm which pays is the paying debtor ; and, by the first rule above stated, has the right of appropriating its payment. Nor is there any limit to the exercise of this right, excepting the universal limit, that it must not be exercised fraudulently. If the new firm pay money which is a part of its old fund or of the profits of its old business, and which the

diately make the application ; "but such application must have been recent, and before any alteration had taken place in the circumstances of" the debtor. In delivering the opinion of the court, granting a new trial, Marshall, C. J., said : "No principle is recollected which obliges the creditor to make this application immediately . . . In declaring that the election, which they supposed to devolve on the plaintiff, if the application of the money was not understood at the time by the parties, was lost if not immediately exercised, the court erred." No notice appears to have been taken of the other branch of the ruling, viz., that the application must be before any change of circumstances, which certainly appears to be a reasonable rule.

(*k*) In Simson *v.* Ingham, 2 B. & C. 65, there were transactions between a London banking company and a country firm. On the death of one of the members of the country bank, a balance was due the London bankers. During the month following, the London banker received sums in payment more than sufficient to discharge the balance due ; but during the same time they advanced money on account of the country bank, to an equal amount. At first, the London bankers entered in their books all receipts and payments made after the death of the deceased partner to the account of the old firm ; but they did not send any account to the country bankers until two months after the death of the deceased partner, and then they sent two distinct accounts, — one the account of the old firm up to the time of the death of the partner ; and the other, a new account, containing all payments and receipts subsequent to that time. The court *held*, that the entry of the payments to the credit of the old account, by the London bankers, not being communicated to the country bank, did not amount to a complete appropriation ; and that the London bankers might apply the payments received subsequently to the death of the deceased partner to the debt of the new firm. See also Barker *v.* Blake, 11 Mass. 16.

(*l*) Allcott *v.* Strong, 9 Cush. 323.

retiring partner had a right to have appropriated to the old debts, and believed was so appropriated, any appropriation by the new firm of such payment to the new debts would be fraudulent, and therefore void so far as the new firm was concerned. If the receiving creditor knew nothing of the appropriation, he could not, on learning it afterwards, set it up against the retiring partner; if he knew it and the accompanying facts, he would be participant in the fraud, and therefore could not enforce it; if he knew the appropriation, but did not know the attendant circumstances, and therefore was personally innocent, the question would be more difficult. We should say, however, that the retiring partner now would not be bound by it. It would be somewhat like a transfer
* 430 of his property,* without his consent or authority, which could give no title to it even to an innocent holder. Nor could the holder complain; because, not having himself appropriated the money, he would be in the same position as if the firm had not. (*m*)

But if the new firm, honestly, and for adequate business causes, appropriated the payment to the new debts, — as, for example, because they had bought goods on a very short credit of an old customer whose earlier claims had not matured, or in any such cases, — the appropriation would doubtless bind the retiring partner.

If the paying firm make no appropriation at all, the receiving creditor may make any which is honest. If, in expectation of the insolvency of the new firm, he discharged their debts, leaving those unpaid on which he could hold the retiring partner, it might well be doubted whether this appropriation was honest, and therefore whether it was valid. So, if he made no

(*m*) Thompson *v.* Brown, Moody & M. 40. See also Fairchild *v.* Holly, 10 Conn. 175; Johnson *v.* Boone, 2 Harring. (Del.) 172; Sneed *v.* Wiester, 2 A. K. Marsh. 277.

In Smith *v.* Wigley, 3 Moore & S. 174, W. & T. were partners, and indebted to the plaintiff. They dissolved the partnership, and T. became indebted afterwards on his separate account. It was *held*, that payments by T. after the dissolution must go in reduction of the entire account, and discharge the earliest items; and that the case of Thompson *v.* Brown, *supra*, did not apply, because T. was liable to the plaintiff for the entire debt due upon both accounts. But in such a case it has been *held*, that the creditor may apply the payment in discharge of the individual debt, and not to the debt due by the firm.

appropriation until he had learned the insolvency of the new firm, and then made his entries so as to hold the retiring partner, this would not be valid. (*n*) But, as before, an appropriation made by him of unappropriated payments, made in a manner and at a time not indicative of wrongful purpose, would be binding on all parties. It scarcely needs to be said, that no party, having distinctly made an appropriation, would be permitted afterwards to change it, for his own benefit and to the injury of others. (*o*)

If the appropriation became matter of law, the leading principle would be, to do justice by it to all concerned, and the first rule for carrying this into effect is, to appropriate payments in order of time; that is, the first payment would be appropriated to the oldest debt, the next to the next, and so on. And no general equities between the parties would be suffered to disturb this order, * unless they were very * 431 strong. (*p*) But the court would respect any indication of appropriation arising from the payments themselves. Thus, if, when purchases were made, bills were given, a bill for each purchase, each identified by its exact amount, or by the term of credit, or both, the payment of money for that bill would of course not only take it up, but would pay for that purchase; and the same principle would require that if no bills were given, but purchases were made on definite credits, payments answering exactly in time and amount to those credits would be appropriated to them, without inquiring whether these were earlier or later debts. (*q*) And, generally, any payments of which the appropriation seemed to be indicated or required by business arrangements would be adopted by the courts. (*r*)

(*n*) See cases *ante*, p. * 428 and notes.

(*o*) This principle is admitted in Simson *v.* Ingham, 2 B. & C. 65; which case see, *ante*, p. * 428, note (*i*).

(*p*) See cases in the two following notes.

(*q*) See Taylor *v.* Kymer, 3 B. & Ad. 320. Thus, where an agent who had, in a previous account, charged himself with a balance due from him, continued to receive money for his principal and to pay money out, it was *held*, that his payments were not necessarily to be first applied to the extinction of the previous balance, where the receipts were equal to the payments. Lysagt *v.* Walker, 5 Bligh, N. S. 1.

(*r*) See Taylor *v.* Kymer, 3 B. & Ad. 320; Stoveld *v.* Eade, 4 Bing. 154; Newmarch *v.* Clay, 14 East, 240. In Wickham *v.* Wickham, 2 Kay & J. 478, J. F. & Sons, as agents of the plaintiffs, supplied goods to the firm of S. & W. upon the footing of the latter becoming debtors to the plaintiffs. They also supplied the same firm with other

One of the most certain indications might arise from asking to whom did the money belong. It is perfectly obvious that if the money belongs to an old firm, it must pay the debts of that firm; if to the new firm, it must pay their debts. Indeed, this is saying no more than "No creditor can pay the *432 debt of one person with *the money of another." (*s*)

If a person has an account with a banking firm which is dissolved, and his account continues as before, so that the transactions before and after the dissolution are comprised in one account, payments made by the new firm are construed to be in liquidation of the earliest items on the joint account, and not of the new account merely. (*t*) And if, upon the dissolu-

goods on their own behalf, and made no distinction in their accounts. E. F. was a partner in both firms. It was *held*, that communications made by the firm of J. F. & Sons to the plaintiffs, admitting a large debt due from the firm of S. & W., and undertaking that E. F. would use his influence as a partner with S. & W. to secure its reduction, upon the faith of which communication the plaintiffs forebore to sue S. & W., precluded the firm from treating their debt to the plaintiffs as one which had been liquidated by the appropriation of the payments made by them to the firm of J. F. & Sons, in order of date. In Henniker *v.* Wigg, 4 Q. B. 793, where a bond was given to secure payments by A. to B. of a specified sum, and certain payments were afterwards made by A., Lord Denman, C. J., after stating the general rule, that, where there is an open account, the first item on the debit side is discharged by the first item on the credit side, said: "But it is equally certain that a particular mode of dealing, and more especially any stipulation between the parties, may entirely vary the case; and this would be the effect in the present instance, if it should appear that this bond was given to secure the plaintiffs against advances which they might from time to time make to the defendant."

(*s*) See cases, *ante*, pp. *429, 430, and note (*l*).

(*t*) Clayton's Case, Devaynes *v.* Noble, 1 Meriv. 572; Pemberton *v.* Oakes, 4 Russ. 168; Simson *v.* Ingham, 2 B. & C. 65, per Bayley, J.; Simson *v.* Cooke, 1 Bing. 452; Williams *v.* Rawlinson, 3 id. 71; Field *v.* Carr, 5 id. 13; Bodenham *v.* Purchas, 2 B. & Ald. 39; Smith *v.* Wigley, 3 Moore & S. 174; Livermore *v.* Rand, 6 Fost. 85; Allcott *v.* Strong, 9 Cush. 323; Farnam *v.* Boutelle, 13 Metc. 159. See also Pennell *v.* Deffell, 4 De Gex, M. & G. 372; Beale *v.* Caddick, 2 Hurlst. & N. 326. And this rule applies as well between partners themselves as between partners and third persons. Toulmin *v.* Copland, 3 Younge & C., Exch. 625, 7 Clark & Fin. 349. In Newmarch *v.* Clay, 14 East, 239, there were three partners, one of them being dormant and unknown. Goods had been furnished to them by the plaintiff, and bills received in payment. The partnership was then dissolved, the dormant partner retiring. Other goods were then furnished, and the bills given before the dissolution of the partnership were dishonored, and new bills given, which were more than sufficient to cover the debts of the old partnership. *Held*, that the delivering up the old bills, on receipt of the new, was evidence of a particular appropriation of the new bills in payment and discharge of the old debt, of which the dormant partner might avail himself in an action on the case for goods sold and delivered, brought against him jointly with the other two partners.

tion, the old account is struck, and the balance due carried to a new account, and debts are afterwards incurred and payments made generally, the payments are first applied to liquidate the first item, — the balance of the old account. (*u*) But, if a new account is opened with the new firm, the creditor may apply a general payment to the new account. (*v*) And, in general, the doctrine of appropriation, and the right of election, apply only where the debts or accounts are distinct in themselves, and are so regarded and treated by the parties. If the whole may be considered as one continuous account, the general rule is, that the payments are to be applied to the earliest items of the account. (*w*)

* If debtors commit a breach of trust in respect to * 433
certain property, and afterwards make payment generally on account to their creditor, who is ignorant of the breach of trust, these payments are not considered as payment of the trust account, although it is earlier in date than the other items. (*x*) And if payments are made on an open account for

(*u*) Sterndale *v.* Hankinson, 1 Sim. 393; Allcott *v.* Strong, 9 Cush. 323.

(*v*) Logan *v.* Mason, 6 Watts & S. 9. See Simson *v.* Ingham, 2 B. & C. 65, cited *supra*, p. *428, note (*j*).

(*w*) Clayton's Case, Devaynes *v.* Noble, 1 Meriv. 609. See also Brooke *v.* Enderby, 2 Brod. & B. 70; Smith *v.* Wigley, 3 Moore & S. 174; United States *v.* Kirkpatrick, 9 Wheat. 720; Jones *v.* United States, 7 How. 681; Postmaster-General *v.* Furber, 4 Mason, 332; United States *v.* Wardwell, 5 id. 82; Gass *v.* Stimson, 3 Sumner, 98; Fairchild *v.* Holly, 10 Conn. 175; McKenzie *v.* Nevius, 22 Me. 138; United States *v.* Bradbury, Daveis, 146. In Bank of Scotland *v.* Christie, 8 Clark & F. 214, the doctrine of Clayton's Case was applied to payments made to a bank by surviving partners, on a debt due from the firm to the bank. But payment will not be applied to the earliest items in an account, if a different intention is clearly expressed by the debtor, or by both parties, or where such intention can be gathered from the particular circumstances of the case. See Taylor *v.* Kymer, 3 B. & Ad. 320; Henniker *v.* Wigg, 4 Q. B. 792; Capen *v.* Alden, 5 Metc. 268; Dulles *v.* De Forest, 19 Conn. 190; Wilson *v.* Hirst, 1 Nev. & M. 742; Beall *v.* McCullough, 27 Md. 645.

(*x*) Clayton's Case, Devaynes *v.* Noble, 1 Meriv. 572. This case decided two points. First, that above stated; and, second, the following: Clayton deposited exchequer bills with a firm of bankers, for safe-keeping; and directed them to take in exchange for them, at their maturity, other bills to be held by them in the same manner, and to apply the proceeds to their own use. There was also a general banking account between the parties. One of the partners died, and the firm some time afterwards became insolvent. Between the death and the bankruptcy, the payments made to Clayton by the survivors exceeded the amount of the cash balance due at the death, and the amount of the bills. But their receipts on his account, during this time, exceeded the sum paid; and the balance due at the bankruptcy, exclusive of the amount of the exchequer

advances, and some of these grew out of illegal transactions, the payments are to be appropriated to the reduction of the legal, and not the illegal, part of the demands. (*y*)

SECTION III.

OF AN INCOMING PARTNER.

A new partner is of course liable for all the subsequent debts of the firm, in the same manner as any other partner; and it is equally obvious that he is not liable for the old debts, unless he assumes them for consideration. (*z*) If, however, he assumes them at all, there is consideration enough in his
* 434 admission into * the firm's business to bind him to those

bills, exceeded the amount of the balance due at the time of the death. The estate of the deceased partner was held liable for the amount of the exchequer bills.

(*y*) *Ex parte* Randleson, 2 Deac. & Ch. 534.

(*z*) Thus, in Young *v.* Hunter, 4 Taunt. 582, and in Ketchum *v.* Durkee, Hoff. Ch. 538, it was *held*, that the fact that the new partners derived a benefit from goods sold to the old firm did not render them liable for the price of the goods. So, if the goods are ordered before and delivered after he joins, he is not liable. Whitehead *v.* Barron, 2 Moody & R. 248. See also Beale *v.* Mouls, 10 Q. B. 976; Bremner *v.* Chamberlayne, 2 Car. & K. 560; Kerridge *v.* Hesse, 9 Car. & P. 200; Beech *v.* Eyre, 5 Man. & G. 415. And a member of a provisional committee is not liable for services performed for the company after he joins, if they are performed in consequence of an order given previously to his joining. Newton *v.* Belcher, 12 Q. B. 921. And if goods are sold to a firm, and the old firm is dissolved, and one of the old partners unites with a new one, and forms a new firm, the new partner is not liable on a note given for the goods by the old partner in the new firm's name. Poindexter *v.* Waddy, 6 Munf. 118. See also Shirreff *v.* Wilks, 1 East, 48. In Hart *v.* Tomlinson, 2 Vt. 101, it is *held*, that a new partner is not liable for an old debt, although the firm name is unchanged, and no notice is given; and that, if the new partner dies pending the suit, this makes no difference. In Dyke *v.* Brewer, 2 Car. & K. 828, a person agreed with A. to furnish him with bricks whenever he wanted them, at a certain price per thousand. Some time afterwards, B. became a partner with A., and ordered bricks from time to time, which were used for a partnership purpose. *Held*, that each order was a new contract; and that B. was liable as partner for all the bricks received after he became a partner, though the court said, that, if the contract had been for a certain number of bricks at so much per thousand, B. would not have been liable. See also Helsby *v.* Mears, 5 B. & C. 504. But see Scott *v.* Beale, 6 Jur. N. S. 559, 98 Eng. Com. L. R. 878, for a case the soundness of which seems very questionable. See Sternburg *v.* Callanan, 14 Iowa, 251, confirmed and adopted in Cadwallader *v.* Blair, 18 Iowa, 420; Hartley *v.* Kirlin, 45 Penn. 49; Thrall *v.* Seward, 37 Vt. 573; Updyke *v.* Doyle, 7 R. I. 446; Francis *v.* Smith, 1 Duvall, 121.

from whom the consideration comes. As to others, the question is more difficult. For instance, the new partner, by his contract with the old firm, agrees to assume all the old debts, and be liable for them like the other partners; and they agree that he shall be jointly interested with them in the stock, the business, and the profits. There is no doubt of the validity of this contract as between the partners; and, therefore, if they or any one of them are obliged to pay any of the old debts, they will have as effectual a remedy against the new partner as they would have had if he had been with them when the debts were contracted. It is, however, another question, whether the creditors of the firm can hold the new partner merely on his contract with the old partners.

It is said that where a partner comes in, and agrees to take all the stock and be liable for all the debts, it is a novation of the debts, and therefore the new partner is bound. But by the law of novation (which is perhaps the latest law borrowed from the civil law) the new debt is not obligatory, unless the old one is discharged; and the old one cannot be discharged without the consent and concurrence of the creditor. And on this ground the creditor could not hold the new partner merely on his contract * with the old ones. If it be * 435 said that the creditor's assent to the reception of additional security may be presumed, it must be replied, that this reception of new security may also imply the loss of the old security; for it may be and often is the case, that the new partner takes the place of an old and retiring partner. A bargain between all the parties, including the creditor, that the old partner should be released and the new one taken, would undoubtedly be valid. But the assent of the creditor to such an arrangement cannot be presumed, (*a*) on the ground that it is necessarily advantageous to him. On the whole, we should say that the law of contracts and the law of partnership lead to the conclusion, that the new partner is not bound to the old creditors, unless on a promise to them, for a consideration; (*b*) both of which might of course be indirect, and implied by circumstances.

(*a*) Catt *v.* Howard, 3 Stark. 5.

(*b*) In Cooke's Bankrupt Laws, 538, it is said, that "where new partners are taken into a trade, and it is agreed

Whether the new incoming partner has thus assumed the old debts, is sometimes a difficult question of mixed law and fact. It certainly may be implied by circumstances; and what circumstances should, in any one case, imply it, is a question partly for the court and partly for a jury. Paying of interest on a debt, with a knowledge, without objection, that the new firm pays the interest, would warrant a jury in finding such an assumption of the old debt. (*c*) And perhaps any single fact of like kind would have the same effect. All of these
* 436 things are evidence for a jury, or * matter for a court to infer such adoption. For it must be obvious that a transfer of the account from the old to the new, and payments made on it, through a long course of time, by the new firm, with the knowledge and without the objection of the new partner, would justify a belief that he was submitting to this actual assumption of the old debts because it was for his interest or a part of his bargain. (*d*)

that the stock of, and debts due to, the old firm should become the capital of the new partnership, and that the new firm should take upon themselves the payment of the debts of the old firm, and the new partnership becomes bankrupt, — the creditors of the old firm may prove as joint creditors of the new;" citing *Ex parte* Brigham (1792); *Ex parte* Clowes, 2 Brown, C. C. 595, &c. This, however, is not now the law; for it is well settled that, if there is an express contract between the partners that the new ones shall be responsible for the debts of the old firm, the creditors cannot sue upon the covenant, because they are not parties to it. *Ex parte* Williams, Buck, 13; *Ex parte* Freeman, id. 471; *Ex parte* Fry, 1 Glyn & J. 96. In *Ex parte* Sandham, 4 Deac. & Ch. 812, it is said, that, to make the new firm liable for the debts of the old, the new partners must adopt the old debts, and the creditors must assent, either expressly or impliedly. See also Ayrault *v.* Chamberlain, 26 Barb. 88. In *Ex parte* Williams, Buck, 13, it is said, that very little would be required to show the assent of the creditors. If a debtor, who has entered into a partnership, proposes to a creditor to transfer his debt to the firm, and the creditor agrees, he cannot prove his debt against the separate estate of the debtor. *Ex parte* Whitmore, 3 Deac. 365. See Stewart *v.* Rogers, 19 Md. 98.

(*c*) *Ex parte* Jackson, 1 Ves. Jr. 131. See Kirwan *v.* Kirwan, 2 Cromp. & M. 617. [Payment of interest by an unincorporated banking association, on a debt existing when a new member comes in, will not of itself show an assumption of such debt by the incoming partner. Shamburg *v.* Ruggles, Sup. Ct. Penn. 3 L. & Eq. Reptr. 313. See also Babcock *v.* Stewart, 58 Penn. St. 179.]

(*d*) In *Ex parte* Jackson, 1 Ves. Jr. 131, Lord Chancellor Thurlow said: "If one man, having debts, takes another into partnership with him, a very little matter respecting those debts will make both liable." In Beale *v.* Mouls, 10 Adol. & E. 976, members of a provisional committee of a company had entered into a written contract for certain machinery. M. then joined the committee, and several payments were made on account of the work, and al-

In one case, where the new and old partners executed a deed, which recited terms of contract, implying an assumption of the debt, though the words of covenant contained no such agreement, it was *held* that the new partner was bound by the recital. (*e*) And, in general, whatever might be the form or technical effect of the contract, if in substance it amounted to an agreement by the incoming partner to share in the debts due from the firm, he would be held accordingly.

A difference in regard to a new partner, who is to be an unknown and dormant partner, has been pressed, perhaps, too far. There is, indeed, no difference between an unknown and a known partner, excepting that the known partner is liable on the credit he gives, as well as on his interest, and the unknown partner on his interest only. If a dormant partner agrees to assume the old debts, he stands in much the same position as a known partner who agrees with his partners to assume them, but makes no promise to the creditors, since they could not have contracted the debts on his credit before he came in. And, if this assumption on the part of the latter binds him to the creditors, a similar assumption on the part of a dormant partner should bind him. (*f*)

* Where the bargain between the partners is, that the new-comer shall be a partner as of a preceding day, here it is *held*, that he is not bound to the creditor, nor a party to the agreement, for a debt contracted between that previous day and the actual making of the contract, (*g*) although he is bound to the partners for his share of the debt, if they pay it. *437

An infant partner, when he comes of age, may, as we have seen, at once escape from all the obligations of the firm, under shelter of his minority. But, if he remains in the firm after

terations suggested and adopted with his sanction; and he also took an active part in superintending the work and making experiments with it. *Held*, that he was not liable on the contract, or on account for goods bargained and sold. And in Saville *v.* Robertson, 4 T. R. 720, it was *held*, that, if no partnership existed at the time of a contract made by one who was afterwards a member of a firm formed subsequently, no subsequent act, by a person who afterwards became a member, — not even an acknowledgment of his liability, or his accepting a bill of exchange drawn on the firm as partners for the very goods, — would make him liable in an action for goods sold and delivered.

(*e*) Vere *v.* Ashby, 10 B. & C. 288.

(*f*) Vere *v.* Ashby, 10 B. & C. 288.

(*g*) Saltoun *v.* Houston, 1 Bing. 433.

full age, he is in a position, in respect to the old debts, somewhat analogous to that of an incoming partner, who assumes the old debts. It is not the same; because he does not adopt or assume the debts of others, but only confirms or leaves valid those debts of his own which he might have avoided. We should say, that this continuance in the firm, and in the business, after full age, would amount to such confirmation by presumption of law. But it seems to be a presumption which may be rebutted. At least, there is no very obvious reason why the partner may not, when he comes of age, distinctly repudiate and annul all obligation or liability for any existing debts, and yet go on with the firm and its business, and so become liable for its future debts. But the general principles of the law of infancy would not permit him to claim his share of the joint funds of the old partnership, and forbid an application of it to the debts of the partnership. Personally, he may escape all liability; but when he comes to demand his share of the funds, and would apply a principle which permits him to take his share before his majority, undiminished by payment of debt, and his share afterwards on the footing of another partner, we are quite sure that he can take no such advantage from his minority, and must lose his share of the profits if he repudiates his liability. (*h*)

If a person or a firm hold on lease real estate, *it seems* that a new partner, coming in after the lease, will not be holden to the landlord for the rent. But, if he joins with the old partners in a promise to the landlord to pay an increase of rent for a consideration, he will be bound for this increase, although the promise is only oral; but such collateral promise will not bind him for the rent originally payable. (*i*) Whether the partnership be changed by a former partner withdrawing, or a new one coming in, it is a general rule, that those persons who were partners when the contract was formed, whether it was express or implied, and they only, can sue upon the contract. (*ii*)

(*h*) See *ante*, p. * 20, note (*k*).

(*i*) Hoby *v.* Roebuck, 7 Taunt. 157.

(*ii*) Cunningham *v.* Munroe, 15 Gray, 471; Tay *v.* Ladd, id. 296. But see Page *v.* Wolcott, id. 536.

SECTION IV.

OF THE DEATH OF A PARTNER.

1. *Dissolution by Death.*

* What was said of the necessary dissolution of a part- *438
nership, when any change is made in it, is true of the change caused by the death of a partner. Dissolution follows immediately and inevitably. (*j*) This rule has been distinctly declared only of late years; for it was in 1808, or about that time, that Lord Eldon declared, in several cases, that the death of any one in any number of partners dissolves the partnership. And even then that chancellor put in the qualification, as we mentioned in a former section, that the death of a partner operates a dissolution of the partnership, unless provision is expressly made to the contrary. (*k*)

(*j*) This question first came up in Godfrey *v.* Browning, 7 March, 1742 (cited in 2 Ves. Sen. 33), where it was *held*, that one copartner could not appoint a representative to carry on the trade after his decease; otherwise, it might fall to the lot of an infant or person not at all fit to carry it on. In Pearce *v.* Chamberlain, 2 Ves. Sen. 33, a bill was brought by the widow and representative of Pearce, against the representatives of Plummer, for liberty to carry on trade with the defendants. Pearce, the plaintiff's intestate, who had been a servant and brewer for Plummer, was taken into partnership by the latter. A provision was made for the continuance of Pearce in the business in event of Plummer's death. Plummer and Pearce having both died, this bill was brought. The court *held*, that articles of partnership do not survive for the benefit of executors, &c., without an express provision for such purpose. See Crawshay *v.* Maule, 1 Swanst. 509, 1 Wils. Ch. 181; Canfield *v.* Hard, 6 Conn. 184; Knapp *v.* McBride & Norman, 7 Ala. 28; Williamson *v.* Wilson, 1 Bland, 425; Thornton *v.* Dixon, 3 Brown's Ch. 200; Gillespie *v.* Hamilton, 3 Madd. 251; Crosbie *v.* Guion, 23 Beav. 518. Lord Eldon, in Vulliamy *v.* Noble, 3 Meriv. 614, says: "I conceive that the death of a partner, of itself, works a dissolution of the partnership." And see Dyer *v.* Clark, 5 Metc. 575; Washburn *v.* Goodman, 17 Pick. 519; Griswold *v.* Waddington, 15 Johns. 82; Jones *v.* McMichael, 12 Rich. Law (S. C.), 176. In a late case, Marlett *v.* Jackman, 3 Allen, 290, the general propositions in the text are supported. And it was *held*, that, in an action on a promissory note given in the name of a firm by a surviving partner, the other surviving partners, under an answer which avers that the firm had expired and was dissolved before the note was given, may prove that the partnership had been dissolved by the death of one of its members. See Bank of N. Y. *v.* Vanderhorst, 32 N. Y. 553, for the effect of the death of one partner on an agent of the firm.

(*k*) There are numerous authorities which hold to this rule; the limitation or proper meaning of which is considered in the text, and in the preceding note. Scholefield *v.* Eichelberger, 7

* 439 * We doubt very much whether this qualification be necessary or accurate. For we do not believe that any provisions made beforehand, in reference to the death of a partner, or any agreements or arrangements made subsequently to his death, can prevent this dissolution. We have, perhaps, sufficiently indicated our reasons for this view, in another place. Here, we need only add, that, as the partner who has died cannot by possibility continue a member of the firm, so any firm of which he is not a member, whether it contain his executors or his children, cannot be the same firm as that of which he was a member. (*l*) What is inaccurately called provision against the dissolution of the partnership, is an agreement that, if either party dies, his property shall remain in the firm and in the business, or that his executors shall carry on the business, for the benefit of his children; or that his children, or some one of them, or some other person, shall, immediately on his death, take his place in the firm, and become partner in his stead. All these agreements and arrangements, and all that can be made for a similar purpose, are, in fact, only bargains for the creation of a new partnership when the old one ceases to exist. And so, too, all arrangements or contracts which may be made between the surviving partners and the representatives or appointee of the deceased have for their effect only the formation of a new partnership, which, upon some terms or other, takes the stock, and carries on the busi-

Pet. 586; Burwell *v.* Mandeville's Executor, 2 How. 560; Kershaw *v.* Matthews, 2 Russ. 62; Gratz *v.* Bayard, 11 Serg. & R. 41; Warner *v.* Cunningham, 3 Dow, 76; Balmain *v.* Shore, 9 Ves. 500. [In mining copartnerships, there being usually no *delectus personæ*, dissolution does not necessarily supervene either upon the death of a partner, or upon one partner's selling out his interest. Taylor *v.* Castle, 42 Cal. 367.]

(*l*) Marlett *v.* Jackman, 3 Allen, 290, cited in note (*j*) to p. *438. And see the authorities cited in preceding note. And see Humphries *v.* McCraw, 5 Ark. 65. "The death or withdrawal of one member of the firm is always a dissolution of the entire partnership." And Savage *v.* Putnam, 32 Barbour (S. C.), 425: "The ordinary effect of the death of one of the members of a partnership is to work its dissolution. The partnership is ended. The connection has been dissolved, and the future relations of the surviving parties to each other must be determined by some new agreement between them, or by the results which the law pronounces upon their acts and proceedings when no new agreement is in fact made." See also Bank of Mobile *v.* Andrews, 2 Sneed, 535; Knowlton *v.* Reed, 38 Me. 246; Laughlin *v.* Loreng's Adm., 48 Penn. 275.

ness of the old one. And, in the consideration of the questions which arise under such provisions and arrangements, we shall reach more accurate conclusions if we keep this principle in mind.

2. *Of the Powers and Interests of the Surviving Partners.*

*There is not in partnership the same survivorship *440 as in joint tenancy; but there is a survivorship which is peculiar to partnership. The death of a partner invests the surviving partners with the exclusive right of possession and management of the whole partnership property and business; but only for the purpose of selling and closing the same. (*m*) It is not uncommon for articles of copartnership to provide how the surviving partner or partners shall conduct or close up the business; and these provisions must be regarded. (*mm*)

(*m*) Loeschigk *v.* Addison, 19 Abb. Prac. R. 169; Crawshay *v.* Maule, 1 Swanst. 495; *Ex parte* Williams, 11 Ves. 5; Peters *v.* Davis, 7 Mass. 256; Evans *v.* Evans, 9 Paige, 178; Dyer *v.* Clark, 5 Metc. 562; Gleason *v.* White, 34 Cal. 258; Miller *v.* Jones, 39 Ill. 54; Remick *v.* Emiz, 41 Ill. 343; in this case, rules for the settlement of the partnership funds and accounts are given; Loeschigk *v.* Hatfield, 5 Robt. 26; Crawshay *v.* Collins, 15 Ves. 226. In this last case, Lord Eldon says: "There may be a partnership where, whether the parties have agreed for the determination of it at a particular period or not, engagements must, from the nature of it, be contracted, which cannot be fulfilled during the existence of the partnership; and the consequence is, that, for the purpose of making good those engagements with third persons, it must continue; and then, instead of being, as it was, a general partnership, it is a general partnership determined except as it subsists for the purpose only of winding up the concerns. Another mode of determination is, not by effluxion of time, but by the death of one partner; in which case, the law says that the property survives to the others. It survives, as to the legal title, in many cases; but not as to the beneficial interest. The question then is, whether the surviving partners, instead of settling the account, and agreeing with the executor as to the terms upon which his beneficial interest in the stock is still to be continued, subject still to the possible loss, can take the whole property, do what they please, and compel the executor to take the calculated value. That cannot be without a contract for it with the testator. The executor has a right to have the value ascertained, in the way in which it is best ascertained, by sale." If this authority of a partner, which continues after a dissolution, for all purposes of winding up, be unduly exercised, the remedy is by applying to the court for the appointment of a receiver. Butchart *v.* Dresser, 4 De Gex, M. & G. 542. See Allen *v.* Hill, 16 Cal. 113; McKowen *v.* McGuire, 15 La. Ann. 637; Roys *v.* Vilas, 18 Wis. 169. But see Skipworth *v.* Lea, 16 La. Ann. 247. The personal note of the survivor, for the firm's debt, is not a satisfaction of the debt, except by special agreement of the parties. Leach *v.* Church, 15 Ohio, 169.

(*mm*) Suydam *v.* Owen, 14 Gray, 195.

If a partner absconds, his copartner may take exclusive possession of the property of the firm, for the benefit of the firm; and it has been held, that the appointment of a receiver to take charge of the property of the absconding partner does not divest the partner remaining of his right to the partnership property. (*mmm*) The survivors and the representatives of the deceased are said to become tenants in common of the partnership property, and they are so, in fact: and survivors are tenants in common as to each other; for they are not partners together after the death of any one partner, unless they become so by the creation of a new firm. But this they may make by words, or silently by their acts and understanding; for they may go on in their business without a word to the public or to each other, in such a way as to indicate clearly that they are partners. But, as to the survivors of the
*441 old firm, they are only tenants in common * with each other, and with the representatives of the deceased, until this new firm is created. Sometimes the deceased partner, by his will, gives to his surviving partner power to carry on the business for a certain time, retaining the interest of the deceased in the funds of the partnership. In this case, the surviving partner may do so, complying with the conditions and directions of the will; but with no right generally to charge a compensation for his services, unless there was some agreement with the deceased partner, or some direction in his will, to that effect. (*nn*) It has, however, been *held* that equity may make some allowance to a surviving partner. (*nm*)

A distinction has been taken of this sort: It is said, that the representatives of the deceased are tenants, in common with the survivors, as to all things in possession, but not as to choses in action; for these the survivors alone have the power and duty to hold, and collect the proceeds, and apply them to the debts of the firm, and are trustees for all concerned in the balance. (*nnn*) We apprehend, however, that this distinction is not necessary, even if it be maintainable. (*o*) The tenancy

(*mmm*) Hammill *v.* Hammil, 27 Md. 679.

(*nn*) Tillotson *v.* Tillotson, 34 Conn. 335.

(*nm*) See *post*, p. *443.

(*nnn*) Story on Part. § 346.

(*o*) A surviving partner has a right to collect all debts due to the firm, and to sell the property. His responsibility to the representatives of the de-

in common exists as to all the effects of the partnership, only as to the *property*, and not as to the *possession*. The survivors have possession and keep possession of every thing. Until a settlement, the representatives of the deceased cannot claim or take any one chattel, or any portion of the merchandise. (*p*) The survivors are, from the death, trustees for all concerned in the partnership; for the representatives of the deceased, for the creditors of the firm, and for themselves. (*q*) Their trust is to wind up the concern in the *best manner *442 for all interested, and, therefore, without unnecessary delay; and their powers are such as enable them most effectually to execute that trust. Nor do we know any difference, in this respect, as to the choses in possession and those in action. After a final settlement, questions may arise as to the disposi-

ceased partner exists only after the partnership affairs are settled. Having the right to collect and dispose of the property, he has the power, for that purpose, of assigning any chose in action belonging to the estate. Pinckney *v.* Wallace, 1 Abb. Prac. R. 82. And see Roys *v.* Vilas, 18 Wis. 169.

(*p*) Real estate, purchased by partners, for the partnership business and with the partnership funds, though conveyed to them by such a deed as, in case of other parties, would make them tenants in common, is considered, in equity, as part of the partnership stock; and is to be applied, if necessary, towards payment of the partnership debts. Though such estate is considered at law as the several property of the partners, yet it is held subject to a trust arising by implication of law, by which it is liable to be sold, and the proceeds brought into the partnership fund, so far as is necessary to pay the debts of the firm; and neither the widow nor the heirs of a deceased partner can claim any beneficial interest in such estate, until the claims of the creditors of the firm are first satisfied. Burnside *v.* Merrick, 4 Metc. 537. And upon the dissolution of the partnership, by the death of one of the partners, the survivor has an equitable lien on such real estate for his indemnity against the debts of the firm, and for securing the balance that may be due to him from the deceased partner on settlement of the partnership accounts between them; and the widow and heirs of such deceased partner have no beneficial interest in such real estate, nor in the rent received therefrom after his death, until the surviving partner is so indemnified. Dyer *v.* Clark, 5 Metc. 562. See *ante*, ch. 11, § 4.

(*q*) Case *v.* Abeel, 1 Paige, 393; Lake *v.* Gibson, 1 Eq. Ca. Ab. 290, affirmed in 3 P. Wms. 158; Jefferys *v.* Small, 1 Vern. 217; Elliot *v.* Brown, cited in Jackson *v.* Jackson, 9 Ves. 597; Lyster *v.* Dolland, 1 Ves. Jr. 434, 435, per Lord Thurlow; York *v.* Eaton, 2 Freem. 23; Booth *v.* Parks, 1 Molloy, 465; Sigourney *v.* Munn, 7 Conn. 11. And see Egberts *v.* Wood, 3 Paige, 517; Ketchum *v.* Durkee, 1 Barb. Ch. 480; Whiteright *v.* Stimpson, 2 Barb. (S. C.) 379; Innes *v.* Lansing, 1 Paige, 583; Campbell *v.* Mullet, 2 Swanst. 574; West *v.* Skip, 1 Ves. 237, 445; *Ex parte* Ruffin, 6 Ves. 126, 128; Wood *v.* Dummer, 3 Mason, 312; Murry *v.* Murry, 5 Johns. Ch. 60; Taylor *v.* Fields, 4 Ves. 396; Young *v.* Keighley, 15 Ves. 557. And see Marlett *v.* Jackman, 3 Allen, 287.

tion of the resulting property, — as whether it shall be divided or sold, or taken by one or another, and on what terms: and these questions we shall, in another chapter, consider; saying now, only, that we perceive no difference in principle between the two kinds of property.

The surviving partners are held strictly as trustees; and their conduct, in discharging their trust, is carefully looked after by courts of equity. (*r*) Thus, like other trustees, they cannot sell the property of the firm and buy it themselves; nor, as the converse of this, can they buy from themselves property for the firm. (*s*) Their trust being to wind up the concern, their powers are commensurate with the trust. Hence, they may collect, compromise, or otherwise arrange all the debts of the firm; and their receipts, payments, and doings generally, in this behalf, are valid, if honest, and within the fair scope and purpose of the trust. And if there be negligence, delay, misconduct, or gross mistake, equity will interfere, and give the proper relief.

*443 *It is said that the surviving partners are trustees, in part, for themselves. But while, as trustees, they have all power and possession, they stand as *cestui que trusts* on the same footing as the others; or, rather, must postpone themselves to the creditors of the firm; and only as to what is left after the creditors are paid do they come in on equal terms with the representatives of the deceased, and with each other.

(*r*) Phillips *v.* Ackerson, 2 Bro. Ch. 272; Hartz *v.* Schrader, 8 Ves. 317; Estwick *v.* Conningsby, 1 Vern. 118; Burden *v.* Burden, 1 Ves. & B. 170; Ames *v.* Downing, 1 Bradf. 321; Washburn *v.* Goodman, 17 Pick. 519; Case *v.* Abeel, 1 Paige, 398, per Walworth, Chancellor: "The surviving partner has the legal right to the partnership effects; but in equity he is considered merely as a trustee to pay the partnership debts and dispose of the effects of the concern for the benefit of himself and the estate of his deceased partner. He cannot, therefore, be permitted to make any gain or profit by the use of the partnership funds and effects for his own exclusive benefit." And see Ogden *v.* Astor, 4 Sandf. 311.

(*s*) But equity will not interfere and deprive the surviving partner of the right of closing up the concern, by appointing a receiver, if he is responsible and acts in good faith. So *held* where the survivor resided in England, but was engaged in closing up the affairs of the firm, by a competent agent, with all reasonable diligence. Evans *v.* Evans, 9 Paige, 178; Jacquin *v.* Buisson, 11 How. Prac. 385. Nor in closing up the affairs of the firm, is there any such principle in equity, that surviving partners cannot become purchasers, from the representatives, of the share of deceased partner. Chambers *v.* Howell, 11 Beav. 6, 12 Jur. 905.

And, if there is not enough to pay the debts in full, then, all being equally liable, they must do nothing to disturb or prevent this equality. (*t*)

The survivors are not bound to continue the business at all; and would probably be permitted to wind it up quite abruptly, if they chose not to engage in new transactions for the firm, or even continue old ones, although the new or the old seemed to promise a much better winding up at the close. And, moreover, if the trustees choose to continue the property in trade, or to go on in business under the credit and risking the effects of the firm, not only will equity restrain them doing so, if injunction be desired by the representatives of the deceased, but if, by such new business, profit is made, the survivors will be bound to account for this profit as belonging to the firm. (*u*) And if no profit, or even a loss, is made, they must be charged with interest on the funds they use, and the whole loss will be theirs. (*v*) *It seems*, however, that, if the survivors carry the business on, and make a profit which is credited to the firm, they may be allowed some compensation for their services, unless the articles of agreement provide otherwise. (*w*) And a surviving partner may be allowed for his time and expenses, under especial circumstances justifying such a claim. (*ww*)

The survivors do not, however, bear more than *their *444

(*t*) See cases cited in previous notes to this section. See Saving and Loan Society *v.* Gibb, 21 Cal. 595, limiting the liability of the surviving partner, id. 496.

(*u*) Waring *v.* Cram, 1 Pars. Sel. Eq. Cas. 522; Washburn *v.* Goodman, 17 Pick. 519; Ogden *v.* Astor, 4 Sandf. 311; Booth *v.* Parks, 1 Molloy, 465; Crawshay *v.* Collins, 15 Ves. 218, 2 Russ. 325; Brown *v.* Litton, 1 P. Wms. 224; Hammond *v.* Douglas, 5 Ves. 539; Brown *v.* De Tastet, Jacob, 284, 292; Heathcote *v.* Hulme, 1 Jac. & W. 122.

(*v*) Simpson *v.* Feltz, 1 McCord Ch. 213; Goddard *v.* Bulow, 1 Nott & McCord, 45; Honore *v.* Colmesnil, 7 Dana, 201; Moon *v.* Story, 8 Dana, 233; and cases in previous note.

(*w*) See Collyer on Part. § 328; and see Cook *v.* Collingridge, Jac. 607; Burden *v.* Burden, 1 Ves. & B. 170; Stocken *v.* Dawson, 6 Beav. 371. But see, also, *contra*, Ames *v.* Downing, 1 Bradf. 321, in which the Surrogate says: "Nor can Mr. Hicks charge commissions, as surviving partner, for the collection of the debts. His legal duty was to collect the assets and wind up the business of the firm; a duty the law imposes on him as an incident to the contract of partnership, and for the performance of which no remuneration is promised or implied. Such a claim is new to me, and I am not aware that it is supported by precedent or authority." Beatty *v.* Wray, 19 Penn. St. 516; Brown *v.* McFarland's Ex., 41 id. 129.

(*ww*) Newell *v.* Humphrey, 37 Vt. 265.

share of losses resulting after the death of the deceased, from transactions entered upon before, and only carried to completion by the survivors.

If the survivor or survivors carry on the business, they may sometimes realize great advantages and large profits from the fact that the business was so well established during the lifetime of the deceased. And then the question may come, whether the court will require them to make an allowance to the representatives of the deceased, for their profit. The question, in fact, amounts to this: Is the good-will of the concern so far partnership property that, if the survivors retain it, they must allow for it? There is but little adjudication on this subject; but that little leads to the conclusion, that the good-will goes to the survivors, without payment or allowance on their part. There are some difficulties, however, attending this view. The stock of goods, the lease, or the right or expectancy of remaining on the premises, all belong to the firm. If the merchandise, if sold in connection with the lease and right, will bring much more money than if sold otherwise, should it not be sold in this way; and if the survivors buy it, or take it, or keep it, should they not, in some form, allow for it the price it would bring if others bought it as they buy it? So much of the good-will — the meaning of which word is not very exactly defined — as attaches merely to the goods and the place, and the existing contracts, belongs, we should say, to all alike; but so much of it as is personal, and originates in the way of carrying on the business, and might go with the survivors wherever they engage in the same business, this belongs to them exclusively. (*x*)

(*x*) An examination of the authorities will show considerable conflict on these questions. Crawshay *v.* Collins, 15 Ves. 218, 227; Crutwell *v.* Lye, 17 Ves. 336; Farr *v.* Pearce, 3 Madd. 74; Lewis *v.* Langdon, 7 Swinb. 421; Willett *v.* Blanford, 1 Hare, 253, 271. *Held*, in Williams *v.* Wilson, 4 Sandf. Ch. 379, that the good-will of a business, built up by a copartnership, is an important and valuable interest, which the law recognizes and will protect; and in Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 68, that, upon a dissolution, it must be sold, and that it does not survive. In Holden's Admr. *v.* McMakin, 1 Pars. Sel. Eq. Cas. 270, it was *held*, that the good-will (consisting of the subscription list, &c.) of a newspaper is partnership property; and, when one of the partners dies, it does not survive to the surviving partner, but is to be sold, with the presses, types, and mechanical appliances of the establishment. In the case of Wedderburn *v.* Wedderburn, 22 Beav.

*It has sometimes been supposed that the surviving *445 partners have a right to take all the effects and mer-

104, the Master of the Rolls, in delivering judgment, says: "The *good-will* of a trade, although inseparable from the business, is an appreciable part of the assets of a concern, both in fact and in the estimation of a court of equity. Accordingly, in reported cases, Lord Eldon *held*, that a share of it properly and as of right belonged to the estate of the deceased partner. It does not survive to the remaining partners, unless by express agreement; but it may by agreement, as it may be agreed that any particular portion of the partnership assets shall so survive. *Good-will* manifestly forms a portion of the subject-matter which produces the profits (which constitutes partnership property); and which is to be divided between the surviving partners and the estate of the deceased partner, according to the terms of the contract, and, when that is silent, according to their shares in the concern. There is considerable difficulty in defining, accurately, what is included under this term *good-will:* it seems to be that species of connection in trade which induces customers to deal with a particular firm. It varies almost in every case; but it is a matter distinctly appreciable, which may be preserved (at least to some extent), if the business be sold as a going concern, but which is wholly lost if the concern is wound up, its liabilities discharged, and its assets got in and distributed. I am of opinion, then, that both on principle, on the authority of the decided cases, and on the ordinary rules of common sense, I must, whenever there is a reputation and connection in business, constituting *good-will*, treat that as part of the assets of the concern." But this opinion may be regarded, to some extent, *obiter;* as the case really holds that, as there was an express agreement in the articles that the good-will should belong to the surviving partner, the plaintiffs were not entitled to participate in the profits, so far as those profits were attributable to the good-will and connection in trade of the old firm. And, indeed, the case itself was finally settled by a compromise. See further, on this question, Hammond *v.* Douglas, 5 Ves. 539; Farr *v.* Pearce, 3 Madd. 74; Chippendale *v.* Tomlinson, Cooke's Bankr. L. 431; Silk *v.* Osborn, 1 Esp. 140; Coslake *v.* Till, 1 Russ. 376; Kennedy *v.* Lee, 3 Meriv. 441, 452; Webster *v.* Webster, 3 Swanst. 490, n.; Harrison *v.* Gardner, 2 Madd. 198; Butler *v.* Burleson, 16 Vt. 176. In Lewis *v.* Langdon, 7 Sim. 421, it was contended that the right to use the designation of a partnership ranges itself under the head of good-will, and that good-will survives, — the personal representatives of the deceased partner having nothing to do with it. The Vice-Chancellor, Sir S. Shadwell, in sustaining this position, said: "The question in this case depends on the right, in the surviving partner, to carry on the business under the name of the partnership. Lord Eldon, certainly, has expressed a doubt, in the case of Crawshay *v.* Collins (15 Ves. 227), upon what has been understood as the proposition laid down by Lord Rosslyn, in the case of Hammond *v.* Douglas (5 Ves. 539). It is true, that the question might have been, to a certain degree, whether, having regard to what had taken place, the money should be considered to belong to one party rather than to another; and it is, also, observable, that Lord Eldon might have been throwing out his observations with reference to a supposed connection between the place where the business was carried on and the good-will. But it occurs to me, that, if the good-will is to be considered as a salable article which belongs to the partnership, then this consequence must follow; namely, that the surviving partner must be under an obligation to carry on the trade for some time after his partner's death, in

*446 chandise (after the *debts are paid or secured) at a valuation. And, undoubtedly, there may be cases in which this would be a just and beneficial mode of settlement, and the court would therefore permit or order it. But it must be clear that they have no such right. Indeed, the right on this point is on the other side; for it would seem, both from the reason of the case and on the authorities, that the representatives of the deceased have a right to require a sale of the effects, as the only certain way of ascertaining their value and making a fair division. But this again, although a rule, cannot be deemed a universal rule; for equity may find in particular circumstances good reason for not decreeing a sale, although it must be admitted that it strongly inclines to that mode of settlement, as, on the whole, the fairest and the safest. (*y*) That the representatives of the deceased may

order that the thing which is said to be salable may be preserved until it can be sold. If a partnership were carried on between A. and B., under the name of Smith & Co., and the surviving partner chose to discontinue the business, and to write to the customers, and say that his partner was dead, and that the business was at an end, — the effect would be, that that which is said to be salable would cease to exist. Now, what power is there in a court of equity to compel a partner to carry on a trade after the death of his copartner, merely that, at a future time, the good-will (as it is called) may be sold? It is plain that, unless there is such a power in this court, it must be in the discretion of the surviving partner to determine what shall be done with the good-will; and, if that is the case, it must be his property. I cannot but think, when two partners carry on a business in partnership together, under a given name, that, during the partnership, it is the joint right of them both to carry on business under that name; and that, upon the death of one of them, the right which they before had jointly becomes the separate right of the survivor." It was accordingly *held*, that, as the plaintiff in this case had never abandoned the right which accrued to him on the death of his partner, an injunction would be granted to restrain the defendant, who was executor of the deceased partner, from using the partnership name in carrying on his business. See Wade *v.* Jenkins, 2 Giffard, 509. See *ante*, ch. 7, sect. 8, subs. 2, where the Good-Will is treated of.

(*y*) Crawshay *v.* Maule, 1 Swanst. 495, 523; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Cook *v.* Collingridge, Jac. 607; Simmons *v.* Leonard, 3 Hare, 581. In winding up the concerns of a partnership, after a dissolution, one partner cannot take the partnership stock at a valuation; but its value must be ascertained by the conversion of it into money. Sigourney *v.* Munn, 7 Conn. 11; Evans *v.* Evans, 9 Paige, 178; Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 68; Conwell *v.* Sandidge, 8 Dana, 278. See also, on this subject, Mifflin *v.* Smith, 17 Serg. & R. 165; Bradley *v.* Chamberlin, 16 Vt. 613; U. S. Bank *v.* Binney, 5 Mason, 185; Dickinson *v.* Bold, 3 Desaus. 501; Wilson *v.* Greenwood, 1 Swanst. 471; Leach *v.* Leach, 18 Pick. 75; Fereday *v.* Wightwick, 1 Tamlyn, 261; Rigden *v.* Pierce, 6 Madd. 353; Pierce *v.* Trigg, 10 Leigh, 406.

have an account taken — or, rather, that their right in this respect is as complete as *the right of the deceased while he lived and was a partner — seems to be certain. (z) *447

At law, the creditors of the firm must bring their actions against the surviving partners only; who, of course, charge what payments they are obliged to make, in account with the estate of the deceased. On the other hand, the survivors alone bring any action to collect a partnership debt, in their own names. At common law, the executor or administrator of the deceased cannot be joined; and the executors or administrators of the *last* survivor sue *alone*, without joining the representatives of the first or of any later deceased. (a)

(z) Waring *v.* Cram, 1 Pars. Sel. Eq. Cas. 522; Washburn *v.* Goodman, 17 Pick. 519; Ogden *v.* Astor, 4 Sandf. S. C. 311. In Scott *v.* Milne, 5 Beav. 215, the court refused to open accounts, though of a general and summary nature, not containing the items, and which had been indorsed by a surviving partner to the representatives of a deceased partner, and had remained unquestioned for twenty-two years; but it decreed an account limited to the subsequent receipts of the surviving partner, which, it was admitted, had taken place. In Wedderburn *v.* Wedderburn, 22 Beav. 84, it is said, that the liability to account for profits derived from trade, carried on after the death of the testator, must depend, in the absence of contract, upon the nature of the trade, the mode of carrying it on, the capital employed, the state of the account between the partnership and the deceased partner, and the conduct of the parties after his death. And see Stoughton *v.* Lynch, 1 Johns. Ch. 469; Brown *v.* Litton, 1 P. Wms. 140; Hammond *v.* Douglas, 5 Ves. 539; Brown *v.* Vidler, 15 id. 223; Brown *v.* De Tastet, Jac. 284; Fearns *v.* Young, 9 Ves. 549.

(a) Barney *v.* Smith, 4 Harris & J. 485; Murray *v.* Mumford, 6 Cow. 441; Davis *v.* Church, 1 Watts & S. 240; Clark *v.* House, 23 Me. 560; Peters *v.* Davis, 7 Mass. 257; Wallace *v.* Fitzsimmons, 1 Dall. 248; McCarty *v.* Nixon, 2 id. 65, note; Smyth *v.* Hawthorn, 3 Rawle, 355; Yale *v.* Eames, 1 Metc. 487; Beach *v.* Hayward, 10 Ohio, 455; [Pfeffer *v.* Steiner, 27 Mich. 537.] In Louisiana, the surviving partner does not possess the right, until he is authorized by the Court of Probate, to sue alone for, or to receive, partnership debts. Flower *v.* O'Conner, 7 La. 194; Connelly *v.* Cheevers, 16 id. 130; Hyde *v.* Brashear, 19 id. 402; Babcock *v.* Brashear, id. 404. On actions against surviving partners, and actions against executors, see Richards *v.* Heather, 1 B. & Ald. 29; Given *v.* Albert, 1 Watts & S. 333; Osgood *v.* Spenser, 2 Harris & G. 133; Grace *v.* Shurter, 1 Wend. 148; Lang *v.* Keppell, 1 Binn. 123; Calder *v.* Rutherford, 1 Brod. & B. 302, 7 Moore, 158. In Thorpe *v.* Jackson, 2 Younge & C. Exch. 553, it was *held*, that joint contractors, whether partners or not, are in equity jointly and severally liable; and, if one die, his assets are liable, but other contractors should be joined. See also Scholefield *v.* Heafield, 7 Sim. 667.

3. *Of the Settlement of the Estate of a Deceased Partner.*

The estate of the partnership would be settled, in a case of dissolution by death, entirely on equitable principles; * 448 and we should * have no doubt that they would require that the claims of the several creditors and those of the joint creditors should be kept entirely distinct, each having its separate fund, and passing over to the other only in case of a surplus. Indeed, as we have already intimated, we consider the decided tendency of common-law adjudication to be in that direction. (*b*) But the question seems not to be so fully settled by authority as we think it to be on principle. In the whole matter of the settlement of such an estate, there are yet questions which cannot be considered as positively determined. Thus, after some conflict and uncertainty, it seems now to be settled

(*b*) Wilder *v.* Keeler, 3 Paige, 167; Morgan *v.* His Creditors, 20 Martin (La.) 599; M'Culloh *v.* Dashiell, 1 Harris & G. 96; Payne *v.* Matthews, 6 Paige, 19; Hall *v.* Hall, 2 McCord's Ch. 302; Bowden *v.* Schatzell, 1 Bailey's Eq. 360; Cammack *v.* Johnson, 1 Green Ch. 163; *Ex parte* Moult, 1 Deacon & Chitty, 44, 73, 1 Montagu, 292. A deceased partner's estate, after payment of his separate debts, is applied in payment of such partnership debts as remain unsatisfied after applying the whole partnership assets in liquidation thereof; and, if his personal estate is insufficient, the real estate of the deceased partner is to be taken. Addis *v.* Knight, 2 Meriv. 117, 119. As to the power of survivors to make a new contract to keep alive a debt against the estate of a deceased partner, see Braithwaite *v.* Britain, 1 Keen, 221. See *ante*, p. * 347, *et seq.*, and notes. [By partnership articles, D. was to be a partner with A. and B. in profits, but not in the capital stock; and he was not required to find any capital. D.'s partnership was to continue for twelve years, at the expiration of which term his interest in the concern was to cease. If D. died during such term, his representatives were to receive a proportionate part of his share of the profits of the current half-year, for the period up to his decease, to be ascertained according to the average of the last two preceding half-yearly stock-takings. D. died; after which the business was carried on by A. and B. until A.'s death, and then by B. alone. A creditor of the firm, in respect of a debt contracted while the firm consisted of A., B., and D., claimed to have the whole of B.'s estate applied in payment of all the creditors of A., B., and D., without regard to whether their debts were contracted before or after the death of D., or before or after the death of A. There were in existence specific assets which had belonged to the firm while it consisted of A., B., and D. *Held*, that, under the partnership articles, D.'s executors had a right to have the debts existing at D.'s death paid out of the then existing assets; that the assets then on hand, and now existing *in specie*, must therefore be applied in payment of the creditors of the original firm of A., B., and D.; and that, therefore, such creditors could not take B.'s separate assets until his separate creditors had been paid in full. *Ex parte* Dear, *In re* White, 1 Ch. D. 514.]

in England, that, on the death of a partner, a creditor of the firm may proceed at once in equity against the estate of the deceased, whether the firm or the surviving partners be solvent or otherwise; the court requiring, however, that the surviving partners should be made parties, because they are interested in the account. (*c*) It may be said, however, that if the firm, or the surviving partner, is solvent, nothing is gained by this: the estate which pays the debt charges it in account with the firm, or against the surviving partner; and there seems to be little more reason why a joint creditor should have this power after the death of a partner than during his life. (*d*) It is derived, however, from the principle, that in equity all the contracts of a partnership are considered to be joint and several. In this country this rule has been a good deal questioned; and, although some acknowledged principles would lead to it, it may perhaps be doubted whether the result of a final adjudication of equity on this point will not protect the estate of the deceased against such * process, unless special circumstances lead * 449 to the conclusion that justice to the creditor, in that particular case, requires it.

The authorities lead also very strongly to the rule, that where there is no joint fund, and no surviving partner who is solvent, the joint creditor shall have the benefit of the separate estate of a deceased partner, *pari passu*, with the separate creditors of that partner. (*e*) We see no more justice in this rule, and no more reason for it, than for saying that the separate creditor, if there be no separate estate, may come in upon the joint property equally with the joint creditors; and this has never been permitted. And the strong disapproval of the rule, sometimes

(*c*) Wilkinson *v.* Henderson, 1 Mylne & K. 582; Devaynes *v.* Noble, 2 Russ. & M. 495; Thorpe *v.* Jackson, 2 Younge & C. 553; Sleech's Case, 1 Meriv. 539; Braithwaite *v.* Britain, 1 Keen, 219. See Kimball *v.* Whitney, 15 Ind. 280. [No suit at law or in equity can in this country be brought against the representative of a deceased partner, or to charge his estate for partnership debts, if the surviving partners are solvent, and the assets of the firm are sufficient to pay its debts. Troy Iron Co. *v.* Winslow, 11 Blatch. (U. S. C. Ct.) 513. See also Paper *v.* Cole, 55 N. Y. 124; Sherman *v.* Kreul, 42 Wis. 33.]

(*d*) See Ridgway *v.* Clare, 19 Beav. 111.

(*e*) Sparhawk *v.* Russell, 10 Metc. 305; Emanuel *v.* Bird, 19 Ala. 596. And see Smith *v.* Mallory's Ex'r, 24 Ala. 628; Wilby *v.* Phinney, 15 Mass. 116; Busby *v.* Chenault, 13 B. Mon. 554; Bell *v.* Newman, 5 Serg. & R. 78.

met with, (*f*) connected with the general tendency of the law at this day to complete its recognition of a partnership as a body by itself, with its own means appropriated to its own debts, lead us to doubt of the propriety and of the permanency of the rule.

The estate of a deceased partner may be discharged by payment of the debt, involving, however, the question of appropriation of payment or, by a transfer of the account, involving the question of novation, much in the same way in which a retiring partner may be discharged; and the view taken of these questions, when considering the discharge of a retiring partner, leads to the conclusion, that notice of a dissolution by death is not necessary to prevent the estate of the deceased from becoming liable for new debts of any kind.

In a recent case, the Supreme Court of Massachusetts considered very fully the question, whether the surviving partners are bound to give notice of the death of a partner, and a dissolution by his death. It is decided, for reasons which seem unanswerable, that there is no such necessity, to avoid a liability caused by the subsequent misuse of the copartnership name by one of the firm. The court say, Bigelow, C. J., giving the opinion, that, by a well-settled rule, no notice need be given by the representatives of the deceased, to avoid liability on future contracts; and they see no reason for imposing a duty of giving notice of the dissolution of the firm on surviving partners. (*g*)

(*f*) M'Culloh *v.* Dashiell, 1 Harris & G. 96; [Irby *v.* Graham, 46 Miss. 425.] See also Pierce *v.* Jackson, 6 Mass. 242; Eddie *v.* Davidson, 1 Doug. 650; Field *v.* Clark, 4 Ves. 396; Fisk *v.* Herrick, 6 Mass. 271; Allen *v.* Wells, 22 Pick. 450; Melville *v.* Brown, 15 Mass. 82; Tappan *v.* Blaisdell, 5 N. H. 190. But see Lord *v.* Baldwin, 6 Pick. 348; French *v.* Chase, 6 Greenl. 166; Church *v.* Knox, 2 Conn. 514; Barber *v.* Hartford Bank, 9 Conn. 407; Donner *v.* Stauffer, 1 Penn. St. 198. That the separate property of each member of the firm is liable at law to be taken in execution by any creditor of the firm, see Allen *v.* Wells, *ubi sup.*; Newman *v.* Bagley, 16 Pick. 570; M'Culloh *v.* Dashiell, 1 Harris & G. 96; Tucker *v.* Oxley, 5 Cranch S. C. 35. See this question fully discussed in Silk *v.* Prime, 2 Lead. Cas. in Eq. 313, Hare & Wallace's notes.

(*g*) Marlett *v.* Jackman, 3 Allen, 287. And see Webster *v.* Webster, 3 Swanst. 490, n.; Vulliamy *v.* Noble, 3 Meriv. 614; Washburn *v.* Goodman, 17 Pick. 519. An exception as to the necessity of such a notice has been made, when the surviving partners, or one of them, are executors of the deceased partner: for then, in order to exonerate his estate from future liability, it is said that due notice ought to be given of his death, to the creditors of the firm; because, in

*The surviving partners, if they hold claims or a balance against the deceased partners, are treated like other creditors. And if as creditors they have any advantage, — as, for example, by being specialty creditors, — this advantage is preserved to them. (*h*) This advantage is greater in England than here. There, an administrator was not permitted to retain his own simple contract debts, against a surviving partner, with whom the deceased partner had covenanted to pay certain debts, and had not paid them. *450

4. *When the Deceased has made his Partner his Executor.*

If a deceased partner has made his partner his executor, certain consequences still result in England which would not take place here; as the rules that an executor should have all property undisposed of, and that the appointment of him as executor discharges any debt due from him, which have lost much of their force and influence there, have none whatever here. It is very common in this country for a partner to appoint a copartner his executor: this adds to his power as surviving partner that of executor; but the combination of these two characters gives him no new rights or powers in either of them. It has been said that the duties of these two characters are inconsistent, and, therefore, the practice objectionable; but they are not found to be so in fact in this country. Doubtless, the executor would be watched very carefully, to guard against his using his executorship as a means of securing undue personal advantage to himself as a partner. The watchfulness of a court of equity on this point is well illustrated by an English case, in which the court opened accounts and arrangements between executor partners and legatees, after they had been confirmed by being acted upon for some thirty years. (*i*)

the absence of such notice, the executor partner, in his character of personal representative of the deceased, has power to bind his estate. Vulliamy *v.* Noble, 3 Meriv. 714. See also, on the general question, Murray *v.* Mumford, 6 Cow. 441; Canfield *v.* Hard, 6 Conn. 184; Burwell *v.* Mandeville, 2 How. (U. S.) 560; Downs *v.* Collins, 6 Hare, 418.

(*h*) Musson *v.* May, 3 Ves. & B. 194; Kerr *v.* Hawthorne, 4 Yeates, 170. See Newell *v.* Humphrey, 37 Vt. 265.

(*i*) Wedderburn *v.* Wedderburn, 2 Keen, 722, 4 Mylne & C. 41.

*451 * How the acts of a person who is both executor and surviving partner are distinguished, so that what he does in one capacity shall not affect rights or interests in his hands in another, may be illustrated by the rule, that payments by a firm, after the death of a partner, even under its old name, where one of the firm is executor of the deceased, shall not be considered payments by that partner as executor of the deceased, if such payments would have the effect of preventing the operation of the statute of limitations as against debts due from his estate. (*j*)

5. *When a Power of Appointment is Given by the Articles.*

We have already remarked that the articles forming the partnership, or an agreement between the partners subsequent to the articles, may provide either that certain representatives of a partner shall, at his death, become partners, or a partner in his place, or that the partner may make provision to this effect in his will. If no such agreement is made between the partners, no one of them has any power, in this respect, excepting

(*j*) Way *v.* Bassett, 5 Hare, 55. In this case, A. deposited moneys with B., C., & D., who were bankers in partnership; and received from them notes, in which they promised to pay him the amount three months after sight, with interest. B. died in March, 1837, having appointed C. and another his executors. C. and D. continued the banking business in the same name until 1842; and interest was regularly paid on the notes by the firm until that time, the payment being indorsed upon the notes, and signed by one of the partners or their clerk. In December, 1843, the executors of A. filed their bill against the executors of B., and the devisees under his will, for payment of the amount of the notes out of the personal or real estate of B. *Held*, that the acts of the surviving partners of B. had not the effect of taking the debt upon the notes out of the operation of the statute of limitations, as against the real or personal estate of the deceased partner; and also, that acts done by one of the surviving partners, who was executor of the deceased partner, and which the surviving partners were in that character bound to do, cannot *primâ facie* be considered to have been done in the character of executor. For authority that the acts of the surviving or continuing partners cannot keep alive a debt or obligation, or otherwise augment or prolong any liability of the estate of the deceased partner, see Atkins *v.* Tredgold, 2 B. & C. 23; Slater *v.* Lawson, 1 B. & Ad. 396; Ault *v.* Goodrich, 4 Russ. 431; Scholey *v.* Walton, 12 M. & W. 510; Barker *v.* Buttress, 7 Beav. 134; *Ex parte* Woodward, 3 Mont. & A. 232. A surviving partner, being the executor of his deceased partner, is not entitled to an allowance for carrying on the business, after his partner's decease, for the benefit of the estate. Burden *v.* Burden, 1 Ves. & B. 170; Stocken *v.* Dawson, 6 Beav. 371.

over his own estate. He may leave this to whom he will, and on what condition he will. *And if he says *452 therein that such a person, whether devisee or legatee, shall become a partner in the firm, the person so pointed out must submit to the conditions, and offer himself as partner. This is equally true whether the deceased has a power of appointment or not; for it is merely an application of the rule, that he who would take the benefit of a testamentary provision must comply with its requirements. And doubtless, if, by an agreement, a partner bound his estate to the continuance of a partnership, it would be regarded by the law as so bound, unless the provision were obviously foolish or inequitable; and all the rights of the representatives would be subject to this obligation. (*k*)

Whether, however, this continuance be provided for by the articles, irrespective of the will of one who should die, or by the will of a deceased partner under the authority of the articles, we have already stated our opinion that it is called a continuance of the partnership inaccurately; it being, in fact and in law, only a provision for the formation of a new partnership which shall stand in a certain relation to the old one.

It is admitted that any such appointment or direction by will shall be construed very liberally towards the appointee, whether executor or not, so as to give him an election whether he will become a partner or not. (*l*) But it must be obvious that if there be no room for this construction,—that is, if the requirement be in terms the most peremptory and absolute,—it cannot, of itself, make the appointee a partner. He does not become one until he assumes that relation by his own act. The deceased may have bound his estate effectually; but, if the appointee chooses to renounce the estate, he is certainly no partner. And this proves that it is not a mere continuance of the same partnership with a new member. So it is said, that, if such appointees, executors, or others are silent, even if the right of choice be given to the executors, their consent will

(*k*) Pemberton *v.* Oakes, 4 Russ. 154; Ponton *v.* Dunn, 1 Russ. & M. 402; Crawshay *v.* Maule, 1 Swanst. 512.

(*l*) Pigott *v.* Bagley, McClel. & Y. 569; Wainwright *v.* Waterman, 1 Ves. 311; Crawshay *v.* Maule, 1 Swanst. 512, per Lord Eldon; Kershaw *v.* Matthews, 2 Russ. 62.

be assumed, and they will be regarded as partners. (*m*) But, in the first place, their consent would hardly be assumed
* 453 from their mere silence; and not unless * they acted in some way to show that they were partners, or unless the being partners was productive of some direct benefit to them, as by a legacy which they indicated their purpose of taking. And, in the next place, the very presumption of their consent shows that it was necessary, and was really that which made them partners, and made the new partnership. It is even *held* as a rule in equity, that such appointee has not only the right of election, but a right to inspect the books and accounts of the partnership, that he may know how to exercise this right. (*n*)

Whether an appointee becomes partner on his own account, or an executor or trustee becomes partner for the benefit of the representatives of the deceased, or there is no new member, although the estate of the deceased, or some part of it, remains in the partnership and in the business, for the benefit of his representatives or appointees, — we consider that the former partnership came to its end by his death, and that the firm now going on, however composed as to persons or estate or business, is a new one. Nor is it in law any less a new one because it stands in very close relations with the former, and may be considered its immediate successor or substitute or representative. (*o*)

Whatever powers of this kind are given to an executor, either

(*m*) Morris *v.* Harrison, Colles, P. C. 157.

(*n*) By partnership articles, it was stipulated, that the partnership should continue for nineteen years; and that, if either of the partners should die, during the term, the widow, or other legal personal representative of the partner so dying, should be let into the partnership, and become a partner therein, in the same manner, and upon the same terms and conditions. *Held*, that this was not an absolute or imperative obligation on the widow or personal representative to become a partner; but only an option so to do, with a stipulation by the surviving partner to admit them. *Held*, also, that the widow, or personal representative, was entitled to a reasonable time to inspect and examine the partnership accounts, but not to have the accounts taken, before they elected whether they would become partners. The usual case of election is, where a person has a right, independent of a testator, and the testator gives such person some other right or benefit, on condition of the former being relinquished, as the dower of a widow; and, in such case, the party is entitled to know the precise value of the benefit intended, before election. Pigott *v.* Bagley, 1 McClel. & Y. 569.

(*o*) See the authorities cited in the following notes.

to become partner, or, being partner, to carry on the business for the benefit of the representatives of the deceased, or to leave the estate of the deceased in the partnership and in the business, on any terms and for any purpose, these powers would probably be strictly construed; at least, they would never be enlarged by implication. Thus, *it is clear *454 that the deceased may limit the amount or proportion of his estate which shall remain in the partnership or go into it, at his own pleasure; and the executors or appointees can no more enlarge this than they can violate any other of his directions. Nor will such a disposition or limitation in any way affect the rights of the creditors of the partnership. But it seems to be regarded in equity somewhat as a proposition made to them, to which they may assent if they please. They have the power of having all his estate brought forth and made answerable for the debts. But they need not execute this power, unless they see fit to do so; and delay and silence on their part will be considered as a confirmation of the provision of a deceased partner. (*p*)

So, the creditors of the new partnership have no claim whatever upon, and no interest in, the general assets of the deceased, or any part of them, but that which he expressly places in the new partnership; which is also another illustration of the principle, that this continued partnership, so called, is a new one. If a part of the property goes into the new partnership, but no person is added to it, the creditors of the new firm have only the security of this part; (*q*) but if a person goes with it, either as executor, or especially as trustee, they have, generally, his

(*p*) Downs *v.* Collins, 6 Hare, 418; *Ex parte* Garland, 10 Ves. 119. On the question of silence being a confirmation of the provision, see Morris *v.* Harrison, Colles, P. C. 157.

(*q*) Burwell *v.* Mandeville, 2 How. (U. S.) 560; Cutbush *v.* Cutbush, 1 Beav. 184; Williamson *v.* Naylor, 3 Younge & C. 208; *Ex parte* Garland, 10 Ves. 110, by Lord Eldon, that under the bankruptcy of an executor and trustee directed by the will to carry on a trade, and a limited sum to be paid to him by the trustees for that purpose, the general assets beyond that fund are not liable. The Lord Chancellor says: "My opinion upon this case is, that it is impossible to hold that the trade is to be carried on, perhaps for a century; and at the end of that time the creditors, dealing with that trade, are, merely because it is directed by the will to be carried on, to pursue the general assets, distributed perhaps to fifty families." See also Pitkin *v.* Pitkin, 7 Conn. 307; *Ex parte* Richardson, 3 Madd. 138, 157; Thompson *v.* Andrews, 1 Mylne & K. 116.

personal liability as partner, in the same way as that of the other partners; for it seems to be laid down as a positive rule, that an executor who carries on the business of his testator pledges his own responsibility to the creditors; and this although it is certain that he continues the business in no degree for his own benefit, but for that of the infant children
*455 of the deceased. (*r*) In this country, a * person may be appointed by equity to carry on a business for the benefit of an infant partner; (*s*) and, doubtless, an English court of equity has this power; and, although we know of no case in which it has been exercised, there are cases in which reference is made to this power. (*t*) But we do not think that a person so appointed by the court would be held, unless a liberal compensation were made to him, subject to the stringent liabilities which, according to the authorities, would seem to attach to an executor who carries on the business in this way.

(*r*) Wightman *v.* Townroe, 1 Maule & S. 412, per Bayley, J.: "The executors in this case are mere volunteers. At law, they became the legal proprietors in respect of every thing belonging to the trade; and consequently are liable for the legal debts." Lord Ellenborough, C. J.: "The fund subsisting at the death of the testator, under a due administration of the will, should have been disposed of by the executors, and converted into money, and distributed as assets. Instead of this, it is embarked *de novo* in the trade in the purchase of other barley, and a variety of other contracts, to which the infant is not privy, nor bound by them, but may renounce when she comes of age as *damnosa hæreditas*. If, then, the infant has such an option, who but the executors can be liable?" See the remarks of Lord Mansfield in Barker *v.* Parker, 1 T. R. 295. See also *Ex parte* Richardson, 1 Buck, 209; Owen *v.* Body, 5 Adol. & E. 28; Alsop *v.* Mather, 8 Conn. 587. If an executor, without any authority from the will, take upon himself to trade with the assets, the testator's estate will not be liable in case of his bankruptcy; the testator's creditors and legatees will have a right to prove demands for such of the assets as have been wasted by the executor in the trade, in proportion to their respective interests; and with respect to such of the assets as can be specifically distinguished to be a part of the testator's estate, they will not pass to the assignees; the executor holding them *alieno jure*, they will not be liable to his bankruptcy. *Ex parte* Garland, 10 Ves. 110; Toller on Executors, 487; *Ex parte* Richardson, 1 Buck, 202.

(*s*) Thompson *v.* Brown, 4 Johns. Ch. 619; Powell *v.* North, 3 Ind. 392.

(*t*) In Sayer *v.* Bennett, cited 1 Montagu on Partnership, Appendix, 20, 1 Cox, 107, Lord Kenyon, in a case where there was an application for the exercise of this power by chancery for the benefit of a lunatic, observed: "It is said that equity should appoint some person to carry on the business for the benefit of the lunatic, *as they would have done for an infant;* but I say, God forbid." And in Barker *v.* Parker, 1 T. R. 295, Lord Mansfield said: "If executors carry on a trade, they must do it as individuals, for their own advantage. I remember many instances of trade being carried on under the direction of the court of chancery."

It would seem that administrators are not chargeable personally with a loss to the assets of their intestate, which were in good faith and for good reason left for a time in the business, unless some negligence or other fault imputable to them can be considered as a cause of the loss. (*u*)

(*u*) In Rowth *v.* Howell, 3 Ves. 565, it was *held*, that executors were not liable for a loss by the insolvency of a banker whom the testator had trusted, and with whom they suffered stock, deposited by the testator, to remain, although they were directed to pay debts, and lay out the residue in mortgages with all convenient speed. They had not been guilty of laches. In Thompson *v.* Brown, 4 Johns. Ch. 628, the distinction which exists in the two classes of cases is very clearly stated by Chancellor Kent. See also Knight *v.* The Earl of Plymouth, 3 Atk. 480, Dickens, 120; Wilkinson *v.* Stafford, 1 Ves. Jr. 41; Vez *v.* Emery, 5 Ves. 144. To authorize executors to carry on a trade, or to permit it to be carried on with the property of a testator held by them in trust, there ought to be the most distinct and positive authority and direction given by the will itself for that purpose. Kirkman *v.* Booth, 11 Beav. 273, 280. By partnership articles, testator's capital was to remain in the concern for eighteen months after his death. By his will, he conveyed his property to his executors, in trust to pay the rent, issues, and profits, dividends, interest, and income of his real and personal estate to his wife, for life. *Held*, that the wife was entitled to the profits of the capital in the partnership until it was separated. Skirving *v.* Williams, 24 Beav. 275.

CHAPTER XIV.

OF DISSOLUTION BY DECREE.

1. *Of a Decree for Misconduct of a Partner.*

The courts of common law have no power whatever of decreeing or causing a dissolution of a partnership. (*a*) In some cases, in which equity would make such a decree, as where a partnership was formed through fraud, courts of law might apply the principle, that a contract so vitiated never had force, and on this ground declare it null, and avoid the partnership. But courts of equity have full power over this matter; and upon a bill filed by any partner, alleging a sufficient cause, and upon proper evidence, if the facts are not admitted, the court decrees a dissolution of the partnership. (*b*) A decree or judgment for winding up the affairs of a partnership may divide the stock and property, after the debts are paid, among the partners; or order it sold, and divide the proceeds in a certain way, which is the more common case. (*bb*) Whichever is done, the decree should, it is said, not be in the alternative, but positive and definite. (*bbb*)

The decree may declare, that the partnership never existed. If fraud, or oppressive or wrongful or illegal purpose, or extreme and certain folly, in the inception and formation of the contract, be alleged and proved, the court would declare that the original formation of a partnership so tainted had no validity in law, and that the partnership never ex-
* 458 isted. (*c*) This procedure is, * however, rare. The far

(*a*) Story on Part. § 284; 1 Story on Eq. Jur. § 673; Stone *v.* Fouse, 3 Cal. 294; Nugent *v.* Locke, 4 id. 320; Wilson *v.* Lassen, 5 id. 116; Barnstead *v.* Empire Mining Co., 5 id. 299.

(*b*) See cases cited in the following notes. And see Baxter *v.* West, 1 Drewry & Sm. 173; and Dumont *v.* Ruepprecht, 38 Ala. 175; Meaher *v.* Cox, 37 Ala. 201.

(*bb*) Watney *v* Wells, Law Rep. 2 Ch. App. 250.

(*bbb*) Harper *v.* Lamping, 33 Cal. 641.

(*c*) Lord Eldon, in Tattershall *v.* Groote, 2 Bos. & P. 135, said: "Courts

more common way is to decree a dissolution of the partnership for causes occurring after its formation.

These are divisible into two classes: those which imply misconduct on the part of one or more partners, and those which do not. Of the first of these, it is always said, that any misconduct of any kind, provided it be such in its character and intensity as to expose the other partners to important injury of any kind, will be considered a sufficient ground for dissolution. (*d*) But it is also frequently remarked, that this is a grave exercise of power, and will not be made for slight reasons. (*e*) Bad temper, * overbearing * 459

of equity interfere in cases where fraud has been practised, and order the consideration to be returned; and then they treat the articles as a nullity, in consequence of the fraud." Howell *v.* Harvey, 5 Ark. 278. "The jurisdiction of a court of equity, in cases of copartnership flowing from the peculiar trusts and duties growing out of that connection, is of the most extensive and beneficial character. It often declares partnerships utterly void, in cases of fraud, imposition, and oppression in the original agreement." And see *Ex parte* Broome, 1 Rose, 69; Hamilton *v.* Stokes, 4 Price, 161, Daniel, 20; Oldaker *v.* Lavender, 6 Sim. 239; Green *v.* Barrett, 1 Sim. 45; Jones *v.* Yates, 9 B. & C. 532; Colt *v.* Wollaston, 2 P. Wms. 154; Fogg & Vanderslice *v.* Johnston, 27 Ala. 432. [Fraud of one partner against the firm is a good ground for dissolution before the expiration of the term. Cottle *v.* Leitch, 35 Cal. 434.]

(*d*) In Howell *v.* Harvey, 5 Ark. 278, the court said: "Habitual drunkenness, great extravagance, or unwarrantable negligence in conducting the business of the partnership, justifies a dissolution; but then it must be a strong and clear case of positive or meditated abuse, to authorize such a decree. For minor misconduct and grievances, if they require redress, the court will interfere by way of injunction to prevent the mischief." Baring *v.* Dix, 1 Cox, 213; Goodman *v.* Whitcomb, 1 Jac. & W. 574, note; Waters *v.* Taylor, 2 Ves. & B. 299; Loscombe *v.* Russell, 4 Sim. 8; Gratz *v.* Bayard, 11 Serg. & R. 41, 48; Littlewood *v.* Caldwell, 11 Price, 97, 99; Marshall *v.* Colman, 2 Jac. & W. 266; Chapman *v.* Beach, 1 id. 594; Norway *v.* Rowe, 19 Ves. 148. [But misconduct will not justify a partner in treating the partnership as ended without a decree and proceeding to take exclusive control of the partnership affairs. Ambler *v.* Whipple, 20 Wall. (U. S.) 546.]

(*e*) Acting on this principle, it was *held*, where articles of partnership provided, that, if either of the partners should give guaranties without consent, the other might dissolve on giving notice, and one of the partners, in the course of eight years, gave a guaranty for 52*l.*, and the other gave notice to dissolve, that this alone was not, in equity, a sufficient ground for a dissolution. Anderson *v.* Anderson, 25 Beav. 190. And in Wray *v.* Hutchinson, 2 Mylne & K. 238, the Master of the Rolls observed, that, upon the opening of the pleadings, he had doubted whether the plaintiff had stated a case which entitled him to a dissolution of the partnership; for although a partnership would be dissolved in equity, if a defendant had substantially failed in the performance of his part of the agreement, yet it was not the office of a court of equity to enter into a consideration of mere partnership squabbles. And see Lord Eldon, in Goodman

and oppressive conduct, quarrelling, indolence, and inattention, intemperance, or bad habits, and disgraceful conduct, wild speculation, gross extravagance, absenting himself from his business, or entering into other business engagements inconsistent with his duty to his partners, or any conduct which brings disgrace upon the firm or impairs their credit, (*f*) — are all causes which may be sufficient, if their *degree* be sufficient; and otherwise not. For one instance of the kind, or two, or three, the court may not interfere, but will leave the parties to

v. Whitcomb, 1 Jac. & W. 592; Henn *v.* Walsh, 2 Edwards Ch. 129. But only little more is needed; and dissolution will be granted, where dissension prevents all hope of advantage. Bishop *v.* Breckles, 1 Hoff. Ch. 534. [Seighortner *v.* Weissenborn, 20 N. J. Eq. 172.] A decree for a dissolution will be warranted, if it is impossible that the partnership should be beneficially continued; namely, if the principles on which the scheme is based are found, on examination, to be erroneous and impracticable, Beaumont *v.* Meredith, 3 Ves. & B. 180; Clough *v.* Radcliffe, 1 De Gex & S. 164; or where the partnership is formed to effect a particular object, which is found to be impracticable, and wholly fails. Nockells *v.* Crosby, 3 B. & C. 814, 5 Dow. & R. 751; [Seighortner *v.* Weissenborn, 20 N. J. Eq. 172;] or where the circumstances have so changed as to render it impossible to carry on the partnership without injury to all the partners, Harrison *v.* Tennant, 21 Beav. 482; or where the object of a partnership is destroyed, as a steamboat, Claiborne *v.* Creditors, 18 La. 501; or if one partner excludes or claims to exclude the other from his proper share of control in the business; or if, though not in terms excluding him, he is so conducting himself as to render it impossible that the business should be conducted on the stipulated terms, Goodman *v.* Whitcomb, 1 Jac. & W. 569; Hale *v.* Hale, 4 Beav. 369; Smith *v.* Jeyes, id. 503; England *v.* Cowling, 8 Beav. 129; Chapman *v.* Beach, 1 Jac. & W. 594; Marshall *v.* Colman, 2 id. 266; Richards *v.* Davies, 2 Russ. & M. 347. See also Kennedy *v.* Kennedy, 3 Dana, 239; Gowan *v.* Jeffries, 2 Ashm. 296; Maude *v.* Rodes, 4 Dana, 144; Story *v.* Moon, 8 id. 331; Garretson *v.* Weaver, 3 Edwards Ch. 385. [In determining whether the court will decree a dissolution, it will consider the state of the partnership business and the probable effect of a decree thereon. Richards *v.* Baurman, 65 N. C. 162. See also Popper *v.* Scheider, 7 Abb. (N. Y.) Pr. N. S. 56.] And, on a decree for dissolution, equity will make such an order as to render the decree effective; namely, by ordering a defendant, in England, to sign a notice of dissolution in "The London Gazette." Troughton *v.* Hunter, 18 Beav. 470.

(*f*) Norway *v.* Rowe, 19 Ves. 148; Waters *v.* Taylor, 2 Ves. & B. 304; Howell *v.* Harvey, 5 Ark. 278; Master *v.* Kirton, 3 Ves. 74; De Berenger *v.* Hammell, 7 Jarm. Conv. 26; Gow on Part. (3d edit.) 227; Wilson *v.* Greenwood, 1 Swanst. 481; Blakeney *v.* Dufaur, 15 Beav. 40; Hall *v.* Hall, 12 id. 414, and note to 419; Williamson *v.* Wilson, 1 Bland, 418; Fogg & Vanderslice *v.* Johnston, 27 Ala. 432; Durbin *v.* Barber, 14 Ohio, 311; [Loomis *v.* McKennie, 31 Iowa, 425]. Excluding one elected trustee in an unincorporated company may be good ground for a decree dissolving the partnership. Berry *v.* Cross, 3 Sandf. Ch. 1. [Or excluding a joint stockholder from his right to participate in the management of the partnership concerns. Werner *v.* Leisen, 31 Wis. 169].

themselves, and hope for their reform and reconciliation. Nor will the decree of dissolution be pronounced merely because one of these, or similar modes of misconduct, goes so far as to expose the other partners to some inconvenience, or to bring discomfort upon them. And if the mischief complained of is specific, and a habit and persisted in, the court may see that injunction will answer as well as dissolution ; and this is to be preferred, because it is a less violent remedy. (*g*)

Such is the general language of courts and text-writers. But * behind all this lies the general question, whether * 460 a court of equity would insist upon binding together, in this relation, two or more parties, one of whom distinctly desired a separation, and this for grounds originating in any kind of misconduct of the others. No application for dissolution by a court is, of course, made where either partner may dissolve it at his pleasure : none, therefore, is made, unless there is a valid contract of partnership to last for a time certain. And, in any such case, we cannot but think the practical rule in this country would be to permit the parties to separate, provided it were obvious that harmonious and profitable co-operation was not to be expected ; and especially if this were made impossible by the fault of one partner, and the other desired the dissolution. The cases cited in our notes will show that carelessness and waste in the business of the partnership, the non-entry in the books of money received, the exclusion of the partners plaintiff from an inspection of the books and accounts, or from their due share of influence and power in the concerns of the firm, and permission of a partner

(*g*) Howell *v.* Harvey, 5 Ark. 279 ; Taylor *v.* Davis, 3 Beav. 388, note (*e*) ; Baring *v.* Dix, 1 Cox, 213 ; Hall *v.* Hall, 12 Beav. 414. [In the matter of dissolution, courts will exercise a wide discretion, and will not act upon slight grounds ; dissension may in some cases be a sufficient ground. Slemmer's Appeal, 58 Penn. St. 168.] But see note to this last case, id. p. * 419, in which the decision in this case was reversed, on the ground that the bill did not seek a dissolution of the partnership. See also, as to this, Oliver *v.* Hamilton, 2 Anst. 453 ; Waters *v.* Taylor, 15 Ves. 10 ; Harrison *v.* Armitage, 4 Madd. 143 ; Goodman *v.* Whitcomb, 1 Jac. & W. 589 ; Marshall *v.* Colman, 2 id. 266 ; Richards *v.* Davies, 2 Russ. & M. 347 ; Smith *v.* Jeyes, 4 Beav. 503 ; Wallworth *v.* Holt, 4 Mylne & C. 635 ; Fairthorne *v.* Weston, 3 Hare, 387 ; Richardson *v.* Hastings, 7 Beav. 325 ; Bailey *v.* Ford, 13 Sim. 495 ; Carlen *v.* Drury, 1 Ves. & B. 158. Equity will not interfere to decree the specific execution of an agreement for a partnership, as it might be dissolved immediately afterwards. Henry *v.* Birch, 9 Ves. 357.

in a banking-house to a customer to overdraw, coupled with the taking security therefor to himself personally, — have all been declared sufficient causes for dissolution. (*h*) And it has been said, that where the affairs of a partnership are rightly before the court, and it appears that these causes for dissolution exist, and in a degree to make the partnership injurious to innocent persons, the court will decree dissolution, even although that relief has not been specifically prayed for. (*i*)

2. *Of a Decree where Misconduct is not Charged.*

The grounds for a decree of dissolution, when fault is not imputed to any partner, are also numerous. Some of these may seem to belong to the first class, or, rather, to a third class intermediate between the other two, because they are causes which spring from the acts of a partner, although they may not be imputed, at least directly, to his fault or wrong-doing.

Of this intermediate class, the first is bankruptcy or insolvency. This, however, is of such magnitude that it
*461 will be considered in *a chapter by itself. Here we will only say, that the reason why bankruptcy of the firm, or of a partner, necessarily produces a dissolution of the partnership, is, that it operates at once an absolute transfer to assignees of the property of the whole firm, or of the whole interest of the bankrupt partner in the property of the firm. Having no longer any ownership, either in the stock or in the profits, all foundation for the relation of partner is taken away. The very same reason applies, and with the same effect, to any cause or act which takes from a partner all this ownership or interest. It may be his voluntary and absolute transfer for a consideration, or his transfer by way of mortgage ; but then it produces dissolution only when the mortgagee takes possession. Strictly and technically speaking, a transfer by way of pledge would have this effect at once, because possession in the pledgee is essential to the nature of a pledge.

(*h*) See cases cited in preceding notes. But see Hall *v.* Hall, as cited on p. *459, note (*g*).

(*i*) Loscombe *v.* Russell, 4 Sim. 11.

Or it may be a levy of execution upon the partner's interest and subsequent sale. (*j*) We should say, however, that an attachment on mesne process * would not have * 462 this effect, nor any further process until actual transfer, if, in the mean time, the partner retains possession. (*k*)

On the same principle, if a single woman who is a partner marries, we have already said that her marriage operates, at common law, an immediate dissolution, because it vests in her

(*j*) In Griswold *v.* Waddington, 16 Johns. 491, Kent, Ch., says: "In speaking of the dissolution of partnerships, the French and civil law writers say, that partnerships are dissolved by a change of the condition of one of the parties, which disables him to perform his part of the duty; as by a loss of liberty, or banishment, or bankruptcy, or a judicial prohibition to execute his business, or by confiscation of his goods. The English law of partnership is derived from the same source; and, as the cases arise, the same principles are applied. The principle here is, that when one of the parties becomes disabled to act, or when the business of the association becomes impracticable, the law, as well as common reason, adjudges the partnership to be dissolved." Fox *v.* Hanbury, Cowp. 445; Skip *v.* Harwood, 2 Swanst. 586; Williamson *v.* Wilson, 1 Bland, 418; Gowan *v.* Jeffries, 2 Ashm. 305; Moody *v.* Payne, 2 Johns. Ch. 548; Dutton *v.* Morrison, 17 Ves. 194, 206. Morton, J., in delivering the opinion of the court in Arnold *v.* Brown, 24 Pick. 93, limits the effect as follows: "The insolvency of one or both partners, we think, would not produce this effect. The insolvency of one might furnish to the other sufficient ground for declaring a dissolution. But, in this State, the inability to pay the company or the private debts of the partners, would not, *per se*, operate as a dissolution. In England, bankruptcy, and in some of our States where insolvent laws exist, legal insolvency, may produce a dissolution. Wherever the one or the other operates to vest the bankrupt's or insolvent's property in assignees or other ministers of the law, it would produce that effect. Probably a voluntary assignment by a partner of all his property would do the same. In such cases, the partner, being divested of his property, and rendered unable to perform the duties of a partner, would, of course, cease to be one; and his assignees coming in as tenants in common, and not partners, the partnership would be dissolved." On this, see Crispe *v.* Perritt, Willes, 467, 1 Atk. 133; Hague *v.* Rolleston, 4 Burrow, 2174; Smith *v.* Stokes, 1 East, 363; Smith *v.* Oriell, id. 368; *Ex parte* Williams, 11 Ves. 5; Wilson *v.* Greenwood, 1 Swanst. 482; Harvey *v.* Crickett, 5 Maule & S. 336; Barker *v.* Goodair, 11 Ves. 78; Marquand *v.* New York Manuf. Co., 17 Johns. 529; Waters *v.* Taylor, 2 Ves. & B. 299. In Habershon *v.* Blurton, 1 De Gex & S. 121, it is expressly decided that execution and assignment of the interest of one of the partners in a firm dissolves the partnership. And see Renton *v.* Chaplain, 1 Stockt. (N. J.) 62. So, a sale by one partner of all his interest to his copartner works a dissolution of the partnership, Rogers *v.* Nichols, 20 Tex. 719; or sale to a stranger or partner, Cochran *v.* Perry, 8 Watts & S. 262; Reece *v.* Hoyt, 4 Ind. 169; Marquand *v.* The New York Manuf. Co., 17 Johns. 525.

(*k*) On questions connected with the attachment of the property of one member of a partnership, see *ante*, p. * 342, et seq.; Estabrook *v.* Messersmith, 18 Wis. 545.

husband all her interest and property in the firm. Her husband cannot claim, as matter of right, to be admitted as partner; and, if he becomes so by agreement, it is a new partnership. And even if, by some valid contract, the marriage leaves her property under her control, she loses by marriage the power of independent personal action in matters of business, and this would suffice to operate a dissolution. But if any peculiar agreements or trusts, or other circumstances, prevented this marriage from operating a dissolution of itself, a court of equity would deem it sufficient cause for a decree of dissolution, in almost any supposable case. (*l*) On both of these principles combined, a partner who passes under guardianship for any reason — whether improper conduct, or weakness of mind, or other cause — has, in the first place, his property taken out of his hands, and, * 463 in the next place, is deprived of the power * of entering into valid mercantile transactions; and, therefore, he must cease to be a partner. The guardian, entering into possession, becomes tenant in common with the other partners, and has a right to an account. But it would seem that such guardianship dissolved the partnership of itself. If not, it would undoubtedly be deemed good cause for a dissolution by a decree. (*m*)

So, pecuniary inability to fulfil material engagements with

(*l*) Both Watson and Gow, in their works on partnership, say this question has never been directly decided; but in Nerot *v.* Burnand, 4 Russ. 260, Lord Lyndhurst said: "When did the partnership terminate? It was a partnership for no definite period; and either party, therefore, might at any moment have put an end to it by notice. Miss Nerot married Mr. Burnand, without consulting her brother; or, at least, without his assent. If she chose so to change her situation as to make Mr. Nerot, in point of fact, — if the partnership went on, — a partner with Burnand, Mr. Nerot had a right, the moment he received notice of that step, to act upon it, and say, 'Your marriage has put an end to the partnership.' No delay took place in that respect; for the bill was filed as early as Hilary Term, 1820, the marriage having taken place towards the close of the preceding year. I agree, therefore, with the Vice-Chancellor, in saying that the partnership was dissolved on the 16th of September, 1819." There is, however, some room for doubting if this case holds any thing more than that, as it was a partnership for no limited period, either party could put an end to it by notice. See *ante*, p. * 23, et seq.

(*m*) Domat, b. 1, tit. 8, § 5, arts. 12, 13; Cod., lib. 4. tit. 37, b. 7; Pothier, Pand. lib. 17, tit. 2, n. 67; 2 Bell's Comm., b. 7, ch. 2, pp. 634, 635 (5th ed.); Griswold *v.* Waddington, 16 Johns. 438, 491; Milne *v.* Bartlet, 3 Jur. 358.

the other partners, whether it were the fault or the misfortune of the partner, would be deemed a sufficient cause. As, if the partnership rested either expressly or by implication, and substantially, upon the agreement of one of the partners to contribute at any certain time, or under certain circumstances, a certain amount to the funds of the partnership, or to pay certain debts, or make certain purchases for the firm, and he fails to perform this promise, through pecuniary inability, it would be a sufficient cause for dissolution. (*n*) So, if he were unable to do his duty to the firm, by disease, not in its nature temporary, but likely to continue for a long time, if it be not incurable, — as by palsy, for example; or if he permanently loses health or strength in any way, or his skill, or makes it apparent that he does not possess the skill which is needed for the proper execution of the work he undertakes to do, — any cause of this kind would be sufficient. (*o*)

* Insanity, of course, would be among the strongest *464 grounds for decreeing dissolution, especially as the insane partner could not of himself agree to the dissolution,

(*n*) Turnipseed *v.* Goodwin, 9 Ala. 372. This case holds that, a partnership being formed for the purpose of buying and selling lands, each partner to furnish an equal share of money, if one should refuse to make the necessary advances, it would be good cause for putting an end to the partnership; but, as long as the partnership subsisted, a larger advance by one partner than it was his duty to make would be compensated by allowing him interest on such excess, or it might furnish a cause of action for a breach of the articles of copartnership. See also, on this point, Boyd *v.* Mynatt, 4 Ala. 79. The same result would arise if one of the partners had lost his capacity to act *sui juris*, by conviction and attainder of treason, or by absconding for debt or crime or felony, or any state-prison offence. Whitman *v.* Leonard, 3 Pick. 117. See Hunt *v.* Clark, 6 De Gex, M. & G. 232, 27 Eng. L. & Eq. 561.

(*o*) Pothier says, that if a partnership has been contracted between two persons, founded on the contribution of capital by the one, and of personal labor and skill by the other, and the latter should become disabled by the palsy to afford either the labor or skill, the partnership would be dissolved, because the object of it could not be fulfilled. Traite du Con. de Soc., Nos. 142, 152; 2 Bell's Comm. 634, 635; 3 Kent's Comm. (9th ed.) 71; Story on Part. §§ 291–294. In Sayer *v.* Bennet, 1 Cox, 107, 109, Lord Kenyon said: "I think, indeed, it may be laid down as a general rule (without considering the particular circumstances of the case), that where partners are to contribute skill and industry, as well as capital, if one partner becomes unable to contribute that skill, a court of equity ought to interfere for both their sakes." Jones *v.* Noy, 2 Mylne & K. 125, 129, 130; Wrexham *v.* Hudleston, 1 Swanst. 514, note; Waters *v.* Taylor, 2 Ves. & B. 299; Wray *v.* Hutchinson, 2 Mylne & K. 235, 238.

however desirable for himself. And here, undoubtedly, a decree of dissolution would be granted upon the petition of those having charge of the insane person and his property, even, perhaps, without any cause additional to the fact of insanity.(*p*) One qualification belongs to this cause, as it does to most of those which have been mentioned: it is that of degree. Of course, delirium from fever, or from a blow on the head, lasting a short time and passing entirely away, would not be sufficient cause. But, while there can be no specific rule as to the measure of insanity which will determine its sufficiency as a cause for the dissolution of partnership, equity would decide such a question by a reference to the universal standard which determines all questions of this kind: Is the insanity such, in cause, character, and degree, as to incapacitate the partner from a reasonable performance of his duty now, and to take away all reasonable hope of his so performing it within a reasonable time? (*q*)

There is one other question, which, although it bears somewhat on the other causes enumerated, is far more important in its reference to insanity; and that is, whether the insanity — supposing it to be certain, complete, and incurable — *of itself* terminates the partnership, or is only good cause for a *465 decree of *dissolution. (*r*) The question might come

(*p*) A leading case on this point is Sayer *v.* Bennet, 1 Cox, 108. Lord Eldon refers to this case in deciding that a dissolution of partnership, on the lunacy of a partner, is to be obtained only by decree, and not by the act of the survivors, nor as long as they carry on business with his capital. He says: "It was supposed that I had contradicted Lord Kenyon's doctrine in Sayer *v.* Bennet. Certainly I did not contradict that doctrine; nor did I make any decree which, duly considered, was an assent to it." Waters *v.* Taylor, 2 Ves. & B. 303. See also Kirby *v.* Carr, 3 Younge & C. 184; The Cape Sable Co.'s Case, 3 Bland, 606–674; Griswold *v.* Waddington, 15 Johns. 57; Leaf *v.* Coles, 12 Eng. L. & Eq. 117; Sadler *v.* Lee, 6 Beav. 324; Jones *v.* Noy, 2 Mylne & K. 125; Wrexham *v.* Hudleston, 1 Swanst. 514, note.

(*q*) Pearce *v.* Chamberlain, 2 Ves. 33; Sayer *v.* Bennet, 1 Cox, 107; Sadler *v.* Lee, 6 Beav. 324. See the remarks of Langdale, Ld. Ch., in giving judgment in this last case. See also Crawshay *v.* Maule, 1 Swanst. 514, note.

(*r*) This is the precise question decided in Jones *v.* Noy, 2 Mylne & K. 125. The Master of the Rolls said: "It is clear, upon principle, that the complete incapacity of a party to an agreement to perform that which was a condition of the agreement is a ground for determining the contract. The insanity of a partner is a ground for the dissolution of the partnership, because it is immediate incapacity; but it may not, in the result, prove to

up in this form: A partner is taken to-day with an insanity, which is soon found to be hopeless and entire. Next week, or month, before lawfully appointed guardians have obtained, or could have obtained, a decree of dissolution, his partners, because they are deprived of his sagacity or relieved from his control, rush into mad or even fraudulent speculations, and not only lose all the property of the firm, but bring upon it an insolvency which it will require all the insane man's private property to pay. He is not liable for these debts, if his insanity terminated the partnership; and, we should say, he would not then be liable even, without notice, (*s*) on the same grounds on which notice is not needed where the dissolution is by death. But, if his insanity did not terminate his partnership, he and his property are liable to all innocent parties for all debts contracted before the decree.

This question has been somewhat considered. There are not wanting strong reasons and high authority for the conclusion, that insanity, certain, complete, and hopeless, of itself and at once dissolves the partnership. (*t*) But, we think, the

be a ground of dissolution, for the partner may recover from his malady. When a partner, therefore, is affected with insanity, the continuing partner may, if he think fit, make it a ground of dissolution; but, in that case, I consider with Lord Kenyon, that, in order to make it a ground of dissolution, he must obtain a decree of the court. If he does not apply to the court for a decree of dissolution, it is to be considered that he is willing to wait to see whether the incapacity of his partner may not prove merely temporary. If he carry on the partnership business in the expectation that his partner may recover from his insanity, so long as he continues the business with that expectation or hope there can be no dissolution." See also Kirby *v.* Carr, 3 Younge & C. 184; Besch *v.* Frolich, 1 Phillips Ch. 172, 7 Jur. 73; Sander *v.* Sander, 2 Collyer, 276. Besch *v.* Frolich holds that, on a bill to dissolve a partnership on the ground of the lunacy of a partner, the court will not make its decree retrospective even to the filing of the bill; still less to the time when the defendant first became incapable of attending to business.

(*s*) In reference to the effect of a notice of dissolution to an insane partner, it has been *held*, that such a notice is sufficient to put an end to a partnership. Mellersh *v.* Keen, 27 Beav. 236; Robertson *v.* Lockie, 10 Jur. 533; Bagshaw *v.* Parker, 10 Beav. 532.

(*t*) C. J. Parker, in 10 N. H. 161, says: "It has been held, in England, that the insanity of one partner does not operate as a dissolution of the partnership; but that object must be attained through a court of equity. But the soundness of this principle may, perhaps, be doubted. It certainly could not have been applied here prior to 1832, as we had before that time no court through whose decree in equity a dissolution could have been effected. Admitting it to be correct in its fullest extent, however, it would not affect this case (a question of the agency of a wife

*446 decided weight of *authority, in England and in this country, opposes this conclusion, and holds that the partnership continues until it is dissolved by decree. (*u*) Still, we think, there is one exception which the courts would allow. If the insanity were determined by due inquest, under process of law, and due public notice were given, we cannot doubt that this would be held to operate a dissolution as effectually as death, and with many of the incidents of a dissolution by death. It is true that, in such case, in this country, a guardian would probably be at once appointed; and this appointment would, as we have seen, effect a dissolution. We think, however, that a legal finding and declaration of insanity would have this effect. It may be well, also, to remark, that, in a case of insanity, when the appointment of guardians would cause much delay, we have no doubt a court of equity would receive a petition from any proper person acting as the next friend of the insane, and, upon cause shown, issue summarily a decree of dissolution. A verdict of an inquisition of lunacy should not, however, have any retrospective influence by relation, and affect any honest transaction which took place previous to the verdict. (*v*)

during the senseless state of her husband); for each partner has an interest, by the partnership contract, and the interest of one partner would not be terminated by the insanity of another. In making a sale or contract, he does not act as agent, but in his own right; and the partnership name may be used by one, without any supposition that another acts individually, or has any knowledge or volition in relation to the matter. But, so long as the partnership continues, the act of one binds the others; and as it is, in its effect, the act of all the partners, it may deserve great consideration, whether the insanity of one, in the absence of any stipulation to the contrary, does not operate *ipso facto* as a dissolution of the partnership itself."

(*u*) See cases cited in preceding notes.

(*v*) In Isler *v.* Baker, 6 Humph. 85, the court *held* that an inquisition of lunacy found against a member of a partnership dissolves *ipso facto* the partnership. Turley, J., in delivering the opinion of the court, said: "Upon the trial, it was contended for Isler, the administrator of Joseph H. Bryan, that the partnership previously existing between him and Henry H. Bryan was dissolved by the commission of lunacy found against Joseph H. Bryan: and that, therefore, Henry H. Bryan had no power or authority to bind him by the note executed as before stated, and so it was *held* by the circuit judge, and, as we think, correctly; for, both upon principle and authority, the inquisition of lunacy, as found, did dissolve the partnership, *ipso facto*, and H. H. Bryan, at the time he executed the note, could only bind himself thereby." In Milne *v.* Bartlet, 3 Jur. 358, it was *held*, that a commission of lunacy finding the fact of in-

* Beside these causes, it is possible that the continuance * 467 of a partnership may become impracticable for any honest purpose, by something in the nature or the condition of the business for which it was formed. As if to carry on a cotton manufactory, and the buildings are burned down, and the partners have no means to build others; or to carry on mining, and it can be shown that the business is disastrous and wasteful, and that only reckless and improvident persons could pursue it. We have seen that such circumstances might, at once, dissolve the partnership. If they had not this effect, equity would certainly give the proper relief to any partners who would otherwise be bound by their contract to continue in a business which could only destroy their remaining means, or had become an entirely different thing from that which they had contemplated. (*w*)

We doubt whether a dissolution can be said to be made by an award of arbitrators to that effect, even where the award is wholly unobjectionable. Perhaps, partners would seldom refuse, except on grounds which would justify setting aside any other award. And, if they did so refuse, equity would probably deem such an award as a cause for decree of dissolution, which was entitled to much consideration. But still it must be the acceptance of the award by the parties, and carrying it into effect, or a decree carrying it into effect, which operates the dissolution, and not the award itself. We have seen that equity, as well as law, would be reluctant to enforce an agreement to refer this or any other question to arbitrators; and for the reason that it dislikes to oust itself of its proper jurisdiction. "This court," said Lord Eldon, "is as likely to decide aright as any arbitrators." But as the law holds parties to any award made upon questions actually and properly submitted, and open to no objection from insufficiency of power, or erroneous exercise of power on the part of the

sanity was sufficient evidence to justify a decree for dissolution, without a reference to the master for an inquiry. As to the retrospective effect of a decree of dissolution for insanity, see Besch *v.* Frolich, cited *ante*, p. * 465, note (*r*).

(*w*) Baring *v.* Dix, 1 Cox, 213; Claiborne *v.* Creditors, 18 La. 501; Beaumont *v.* Meredith, 3 Ves. & B. 180; Clough *v.* Radcliffe, 1 De Gex & S. 164; Nockels *v.* Crosby, 3 B. & C. 814, 5 Dow. & R. 751; Harrison *v.* Tennant, 21 Beav. 482.

arbitrators, so would equity; and, therefore, we think it would compel a dissolution so awarded. (*x*)

(*x*) The leading case on the power of arbitrators to dissolve a partnership when all matters in difference are referred, is Green *v.* Waring, 1 W. Bl. 475. See also Street *v.* Rigby, 6 Ves. 815; Heath *v.* Sansom, 4 B. & Ad. 172; Maley *v.* Newman, 5 Dow. & R. 317; Byers *v.* Van Deusen, 5 Wend. 268; Rolle Arbitr. b. 2; 3 Vin. Abr. 42. If an arbitrator be appointed to arbitrate a certain measure contemplated between two parties as a dissolution of partnership, he is not necessarily bound to direct that the partnership shall be dissolved. Simmons *v.* Swaine, 1 Taunt. 549.

CHAPTER XV.

OF BANKRUPTCY AND INSOLVENCY.

An act to establish a uniform system of Bankruptcy throughout the United States was passed by Congress, and approved March 2, 1867; and there have been some later acts in amendment of the first. The 36th section of that act relates to the Bankruptcy of Partnerships, and applies to corporations and partnerships the provision of the Act. We shall treat, in this chapter, of the questions which have arisen in England and this country, under the application, to partners and partnerships, of the laws of bankruptcy and insolvency.

SECTION I.

WHEN AND HOW A BANKRUPTCY DISSOLVES A PARTNERSHIP.

* It is a well-established rule of law and of equity, * 469 that Bankruptcy or Insolvency, meaning hereby legal and technical bankruptcy or insolvency, whether of one partner or of the firm *per se*, operates a dissolution of the partnership. (*a*)

(*a*) Fox *v.* Hanbury, Cowp. 445; *Ex parte* Smith, 5 Ves. 295; Wilson *v.* Greenwood, 1 Swanst. 471; Crawshay *v.* Collins, 15 Ves. 217; Marquand *v.* New York Manuf. Co., 17 Johns. 525; Griswold *v.* Waddington, 16 id. 436, 491; Williamson *v.* Wilson, 1 Bland, 418; Gowan *v.* Jeffries, 2 Ashm. 296; Smith *v.* De Silva, Cowp. 471; *Ex parte* Ruffin, 6 Ves. 126; Crawshay *v.* Maule, 1 Swanst. 507, note; [Wilkins *v.* Davis, 15 N. B. 460, Lowell, J.; Halsey *v.* Norton, 45 Miss. 703. One who permits himself to be held out as a partner may be made a bankrupt, as a member of the firm, at the suit of a creditor. *Re* Krueger, 2 Lowell Dec. (U. S. Dist. Ct.) 66; *Re* Disideri & Co., L. R. 11 Eq. 242; *Re* Rowland, L. R. 1 Ch. 421; Campbell *v.* Hastings, 29 Ark. 512; Carmichael *v.* Greer, 55 Ga. 116. An insolvent member of a dissolved firm, who had given a bond with a solvent surety to his former copartners to pay the debts of the firm, cannot petition his late copartners (the latter being solvent) into bankruptcy. *Re* Bennett & Ames, 2 Lowell Dec. (U. S. Dist. Ct.) 400. A person who is partner in two firms may be adjudged bankrupt with each firm. *In re* Jewett, 15 N. B. R. 126. A petition

A question exists, however, as to the time when a dissolution from this cause takes place. In England, it seems now well settled, that the dissolution does not take place until it is formally declared by competent authority; but then it goes back in its effect, by relation, to the time when an act of bankruptcy was committed. (*b*) We should say, that the dissolution took place as soon as the assets were vested in the assignee, with perhaps a retrospective effect, carrying back the dis-
*470 solution to the *time of the filing of the petition of bankruptcy, or possibly only to the issuing of the warrant. (*c*)

That the cause why bankruptcy operates dissolution, is its taking all interest and property in the partnership stock out of the bankrupt's hands, seems to be clear. Whatever has this effect causes a dissolution. Thus, if there be a prayer for an account and a receiver, the appointment of a receiver operates a dissolution, if he takes all the property into his own hands and possession; so that, after such appointment, the power of giving preferences among the creditors is gone. (*d*) But if he is appointed rather as a manager or overseer, leaving the

of one member of a firm to have the firm declared bankrupt is no bar, before adjudication, to a suit by one of the partners on a claim due him individually. Booth *v.* Meyer, Sup. Ct. Penn. October, 1876, 14 N. B. R. 575. When all the members of one firm are partners in another firm, they cannot prove its debt against the latter. *In re* Savage, 16 N. B. R. 368, U. S. Dist. Ct. N. D. N. Y.]

(*b*) Fox *v.* Hanbury, Cowp. 445; Hague *v.* Rolleston, 4 Burr. 2174; *Ex parte* Smith, 5 Ves. 295; Harvey *v.* Crickett, 5 Maule & S. 336; Dutton *v.* Morrison, 17 Ves. 194; Barker *v.* Goodair, 11 id. 78; Thomason *v.* Frere, 10 East, 418; Siegel *v.* Chidsey, 28 Penn. 287; Smith *v.* Stokes, 1 East, 364.

(*c*) Morton, J., in Arnold *v.* Brown, 24 Pick. 93, *held* that "the insolvency of one or both partners we think would not produce this effect. The insolvency of one might furnish to the other sufficient ground for declaring a dissolution. But, in this State, the inability to pay the company or the private debts of the partners would not *per se* operate as a dissolution." In England, bankruptcy, and in some of our States where insolvent laws exist, legal insolvency, may produce a dissolution. Wherever the one or the other operates to vest the bankrupt's or insolvent's property in assignees or other ministers of the law, it would produce that effect. Probably a voluntary assignment by a partner, of all his property, would do the same. In Pennsylvania, it is *held*, that simple insolvency, without an assignment or any judicial process, does not work a dissolution of the partnership, nor divest the partners of their dominion over the partnership property. Siegel *v.* Chidsey, 28 Penn. 287.

(*d*) Egberts *v.* Wood, 3 Paige, 517. The receiver is entitled to the possession of the books of the firm. Succession of Andrew, 16 La. Ann. 197.

property where it stood before, we should doubt whether it would have the effect of a dissolution. How far it would control or restrain the power of disposing of the effects would probably depend upon the terms of the decree. Moreover, it was distinctly *held*, where there were no statutes of insolvency, properly so called, that actual insolvency, or inability and refusal to pay debts, does not operate a dissolution; and the reason assigned is, that it does not of itself transfer the property of the insolvent to assignees. And, even in England, absconding is *held* not to operate a dissolution, although a very strong act of bankruptcy, on which a sequestration may be founded, which shall go back by relation to the absconding. (*e*)

* Formal and complete bankruptcy acts upon a part- *471
nership in many respects like death. (*f*) If it be the bankruptcy of the firm, it is like the death of all the partners. If the bankruptcy of one partner, it is like his death. And we should expect this result upon a mercantile partnership, because bankruptcy is the death of the bankrupt as a merchant. If discharged, he may begin again, free from his old debts, and without his old means, and he begins as a new man.

Some of the consequences which illustrate the analogy between bankruptcy and death are these: The bankrupt loses all possession of his property, and all power over it, and all interest in it. There is always a legal possibility that the assets may pay his debts and leave a surplus; and when this happens in fact, the interest and right of the party revive, because he is

(*e*) Morton, J., in Arnold *v.* Brown, 24 Pick. 94, said: "In England, the absconding would be an act of bankruptcy; and the bankruptcy, when determined by regular adjudication, would create a dissolution. But the absconding is never relied upon as a dissolution. And *held*, in accordance with the above, that the absconding of one of the partners of a firm will not produce a dissolution in this country; overruling Whitman *v.* Leonard, 3 Pick. 179, on this point. And see *Ex parte* Smith, 5 Ves. 295; Hilliard on Bankruptcy, § 17; Fox *v.* Hanbury, Cowp. 445; Crispe *v.* Perritt, Willes, 467, 1 Atk. 133; Hague *v.* Rolleston, 4 Burr. 2174; Smith *v.* Stokes, 1 East, 363; Smith *v.* Oriell, id. 368; *Ex parte* Williams, 11 Ves. 5; Wilson *v.* Greenwood, 1 Swanst. 482; Harvey *v.* Crickett, 5 Maule & S. 336; Barker *v.* Goodair, 11 Ves. 78; Dutton *v.* Morrison, 17 id. 193; Marquand *v.* N. York Manuf. Co., 17 Johns. 529.

(*f*) Lord Eldon in *Ex parte* Williams, 11 Ves. 5. See Rothwell *v.* Dewees, 2 Black (U. S. S. C.), 613.

no longer a bankrupt; but, while he is one, his property is taken wholly from his hands. (*g*)

SECTION II.

OF THE EFFECT OF THE BANKRUPTCY OF A PARTNER UPON SOLVENT PARTNERS.

His property, rights, and interests pass from the bankrupt to his assignees. They do not become partners in his stead, because the *dilectus personarum*, and other principles of the law of partnership, prevent this. But they become tenants in common with the partners, and have the rights and obligations of tenants in common, with some qualifications, and, *472 perhaps, some additions, which arise * from the peculiar origin of the tenancy. (*h*) Thus, the assignees may claim an account, and require a prompt and complete settlement of the concern. (*i*) They cannot take the property and

(*g*) Barstow *v.* Adams, 2 Day, 70; Kitchen *v.* Bartsch, 7 East, 53; Cohen *v.* Gibbs, 1 Hill (S. C.), 206; Stouffer *v.* Coleman, 1 Yeates, 399. The assignment of an insolvent debtor has the same effect. Cooper *v.* Henderson, 6 Binn. 189; Shirley *v.* Long, 6 Rand, 735; Bank *v.* Horn, 17 How. 157.

(*h*) Fox *v.* Hanbury, Cowp. 449; West *v.* Skip, 1 Ves. 239; Smith *v.* Stokes, 1 East, 363; Smith *v.* Oriell, id. 368; [Wilkins *v.* Davis, 15 N. B. R. 66.] In Barker *v.* Goodair, 11 Ves. 85, Lord Eldon says: "When one partner becomes a bankrupt, his interest in the partnership property is vested in his assignees; and, according to the doctrine of this court, perhaps with equities in them, vastly beyond what tenants in common have, where no bankruptcy has occurred." And Chancellor Kent, in Murray *v.* Murray, 5 Johns. Ch. 78: "The solvent partner, upon the dissolution of the partnership by bankruptcy, being a tenant in common, may retain and distribute the funds in his possession; and may, as was held in Fox *v.* Hanbury, sell those partnership effects for a valuable consideration, and without fraud. They cannot be called out of his possession by his co-tenants, the assignees, unless under the direction of this court, on a bill filed by them for contribution; or, perhaps, where an account of the joint fund is directed to be taken in bankruptcy. But, on the other hand, there is no foundation, in law or equity, for the solvent partner to call to account either the partnership debtors who have *bonâ fide* settled with the assignees, or the assignees themselves, for the funds in their possession. They hold those funds by an equal title in law with him, as tenants in common; and by a superior equitable title, as trustees, charged with the payment of both the joint and separate debts." Anon., 12 Mod. 446; Wilson *v.* Greenwood, 1 Swanst. 482; Marquand *v.* N. Y. Man. Co., 17 Johns. 525. See Richardson *v.* Tobey, 3 Allen, 81.

(*i*) Hilliard on Bankr. and Ins. 60; Crawshay *v.* Collins, 15 Ves. 218.

business into their own hands, and settle it themselves, because the solvent partners, at least in equity, hold, in somewhat the same way that surviving partners do, all the effects and property, and for the same purpose, — that of winding up the concern. For this they have the same power and duty, and are under the same obligations, and may be reached by the same process, and compelled to discharge their duty as surviving partners. And the assignees have the same rights and remedies as the representatives of a deceased partner. (*j*) It has, however, been *held*, that the assignees become at once tenants, in common with the solvent partners, their representatives or assigns: they can neither bring trover against * the * 473 partners for the partnership effects, nor can the solvent partners get their effects out of the hands of the assignees when they have taken possession; for it is said, that, at law, they are equally entitled to the possession. (*k*) Whether the partnership be determinable at will, or established for a time certain, it is equally and immediately dissolved. And even if there were a provision in the articles, that, in case of bankruptcy of one partner, the other partner should take all his share and interest, at a certain valuation, and continue the business, and this provision were carried into full effect, there is, nevertheless, a dissolution of the partnership. (*l*) For the loss of his property and interest takes out the bankrupt partner, and the loss of this partner dissolves the partnership. There is much doubt, however, whether a provision of this kind is not avoided by bankruptcy, because it gives to the bankrupt a power over the disposition of his property which all the principles of the

(*j*) Crawshay *v.* Collins, 15 Ves. 218; Brown *v.* De Tastet, Jac. 284. In Hubbard *v.* Guild, 1 Duer, 662, it was *held*, that a solvent partner is not entitled by law to the sole administration of the assets of the partnership, which is dissolved by the separate insolvency of one or more of the partners. The court added, that they saw no reason why the solvent partner should not himself be appointed the receiver, if he would give the necessary security. It seemed to them that in all cases where the dissolution of a partnership is occasioned solely by the insolvency of one of the partners, the solvent partner ought to be appointed receiver, when his capacity and integrity are unquestioned. The appointment was made accordingly. See also Freeland *v.* Stansfield, 13 Eng. L. & Eq. 336.

(*k*) Murray *v.* Murray, 5 Johns. Ch. 70; Smith *v.* Stokes, 1 East, 363; Salomons *v.* Nissen, 2 T. R. 674; Fox *v.* Hanbury, Cowp. 445; Smith *v.* Oriell, 1 East, 368; Binford *v.* Dommett, 4 Ves. 756.

(*l*) Comyn on Cont. (4th Am. ed.) 528.

bankrupt laws deny to him; but the question can hardly be considered as settled. (*m*)

So, too, no notice or knowledge of the bankruptcy or of the dissolution is requisite, any more than in the case of dissolution by death, to prevent the partner or his assets from being bound for new contracts or debts, and to prevent the solvent partners from acting for him, except to liquidate and
* 474 realize the balance due * to him. The rule arises, in part, from the notoriousness of the fact of legal bankruptcy, and, in part, from the taking from him, by the law, of all his means of satisfying a liability; but in part, also, as we think, from bankruptcy being a *quasi* death. (*n*)

If the solvent partners, instead of winding up the concern, continue the business, without stay or interruption, they do so at their own peril, and upon precisely the same terms and responsibility which have already been stated in reference to surviving partners. (*o*)

And it may be stated, as another instance of the analogy between the actual death of a partner and that bankruptcy which is a commercial death, that the latter suspends, or, rather, annuls, any attachment or execution of his property or his interest in the firm. (*p*) We should say, however, that the

(*m*) See Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Rigden *v.* Pierce, 6 Madd. 353; Cook *v.* Collingridge, Jac. 607–620. In Cookson *v.* Cookson, 8 Sim. 543, the case of Cook *v.* Collingridge is criticised. The following are some of the principal authorities applicable to the main point: Lockyer *v.* Savage, 2 Strange, 947; Hunter *v.* Galliers, 2 T. R. 133; *Ex parte* Hill, Cooke's B. L. 228, 1 Cox, 300; *Ex parte* Bennet, Cooke's B. L. 229; *In re* Murphy, 1 Schoales & L. 44; *Ex parte* Henecy, cited id.; *In re* Meaghan, id. 179; Dommett *v.* Bedford, 6 T. R. 684, 3 Ves. 149; *Ex parte* Cook, 8 id. 353; *Ex parte* Hinton, 14 id. 598; *Ex parte* Oxley, 1 Ball & B. 257; Higinbotham *v.* Holme, 19 Ves. 88; *Ex parte* Vere, id. 93, 1 Rose, 281; *Ex parte* Young, Buck, 179, 3 Madd. 124; *Ex parte* Hodgson, 19 Ves. 206. And see Brandon *v.* Robinson, 18 id. 429. The general distinction seems to be that the owner of the property may, on alienation, qualify the interest of his alienee by a condition to take effect on bankruptcy; but cannot, by contract or otherwise, qualify his own interest by a like condition, determining or controlling it in the event of his own bankruptcy, to the disappointment or delay of his creditors; the *jus disponendi*, which for the first purpose is absolute, being, in the latter instance, subject to the disposition previously prescribed by law. Note to 1 Swanst. 481.

(*n*) Vulliamy *v.* Noble, 3 Meriv. 614; Lacy *v.* Woolcot, 2 Dow. & R. 458; Thomason *v.* Frere, 10 East, 418; Franklin *v.* Brownlow, 14 Ves. 550–557.

(*o*) Crawshay *v.* Collins, 15 Ves. 218; Brown *v.* De Tastet, Jac. 392; West *v.* Skip, 1 Ves. 239, 456.

(*p*) Barker *v.* Goodair, 11 Ves. 78; Dutton *v.* Morrison, 17 id. 193; *In re*

American rule of bankruptcy would be applied to this case, if it were a foreign bankruptcy. That is, if there were a foreign firm, which went into bankruptcy abroad, and a creditor of one of the partners, in this State, attached or was levying upon his interest in property, within this State, belonging to the firm, the foreign bankruptcy would not suspend this attachment or levy. But, if the foreign assignee had taken possession of the property, his possession would have completed his title, and would prevent the attachment or levy. And, in this respect, our States are foreign to each other. (*q*)

* All actions for recovery of debts due to the firm may *475 be brought in the name of the solvent partners and the assignees of the bankrupt partners ; (*r*) and all actions against the firm should be brought against all the partners by name, (*s*) including the bankrupt, (*t*) unless he has been discharged. (*u*)

Wait, 1 Jac. & W. 605. The interest of each partner being his share of the surplus, subject to all the partnership accounts, that interest only is liable to the execution of a creditor ; and, by the bankruptcy of one, his interest is divested, and vests in the assignees, by relation to the act of bankruptcy. Brickwood *v.* Miller, 3 Meriv. 279 ; *Ex parte* Farlow, 1 Rose, 421 ; Caldwell *v.* Gregory, 1 Price, 119–130 ; *Ex parte* Peake, 1 Madd. 358 ; *Ex parte* Ruffin, 6 Ves. 126 ; *Ex parte* Rowlandson, 1 Rose, 419 ; Campbell *v.* Mullett, 2 Swanst. 551–575 ; Egberts *v.* Wood, 3 Paige, 517. See Willis *v.* Freeman, 35 Vt. 44. The subject of the attachment of a partner's interest is discussed in Day *v.* McQuillan, 13 Minn. 205.

(*q*) The authorities on these points are very numerous, and at one time were very conflicting. The later authorities generally support the text, which is the American, in opposition to the English, doctrine. We furnish a number of the authorities, both early and recent. Proctor *v.* Moore, 1 Mass. 198 ; Baker *v.* Wheaton, 5 id. 509 ; Watson *v.* Bourne, 10 id. 337 ; Ogden *v.* Saunders, 12 Wheat. 213 ; Prentiss *v.* Savage, 13 Mass. 20 ; Tappan *v.* Poor, 15 id. 419, 422 ; Blake *v.* Williams, 6 Pick. 286, 306 ; Agnew *v.* Platt, 15 id. 417 ; Betts *v.* Bagley, 12 id. 572, 579 ; Savage *v.* Marsh, 10 Metc. 594 ; Fiske *v.* Foster, id. 597 ; Springer *v.* Foster, 2 Story, 383 ; Shaw *v.* Robbins, 12 Wheat. 369, note ; Milne *v.* Moreton, 6 Binn. 353 ; Harrison *v.* Sterry, 5 Cranch, 289, 302 ; The Watchman, Ware, 232, 237 ; Dawes *v.* Head, 3 Pick. 128 ; Richards *v.* Dutch, 8 Mass. 506 ; Burk *v.* McClain, 1 Harris & McH. 236 ; Wallace *v.* Patterson, 2 id. 463 ; Ward *v.* Morris, 4 id. 330 ; Smith *v.* Smith, 2 Johns. 235 ; Bird *v.* Caritat, id. 342. For a late English case, see Nicholson *v.* Ricketts, 2 Ellis & E. (105 Eng. Com. L.) 497.

(*r*) Thomason *v.* Frere, 10 East, 418 ; Murray *v.* Murray, 5 Johns. Ch. 70 ; Hacker *v.* Shepherd, 2 Chitty, 652 ; Graham *v.* Robertson, 2 T. R. 282. An action does not abate by the bankruptcy of the plaintiff. The assignees can continue the action in his name. Waugh *v.* Austen, 3 T. R. 437.

(*s*) Bristow *v.* James, 7 T. R. 257 ; Byers *v.* Dobie, 1 H. Bl. 236 ; Ditchburn *v.* Spracklin, 5 Esp. 31 ; Dodge *v.* Dicas, 3 B. & Ald. 611 ; Rice *v.* Shute, 5 Burr. 2611 ; Vernon *v.* Jefferys, 2 Strange, 1146 But see, under a peculiar state of facts, Colwell *v.* Lawrence, 38 Barb. 643.

(*t*) 1 Chit. Pl. (10th Am. ed.) 53.

(*u*) Tuttle *v.* Cooper, 10 Pick. 291.

If he has been discharged, and is still made defendant, it would seem that he may have judgment against the plaintiff; and the plaintiff may have judgment against the other partners. (*v*) In suits in equity, different rules prevail from those which govern suits at law. The general principle there may be said to be, that the parties actually interested must always be joined, whether as plaintiffs or defendants. (*w*)

If one partner be bankrupt, his discharge does not discharge the other partners, nor affect their indebtedness, excepting as to the sum which the creditor takes by way of dividend; which is, of course, deducted from the debt due to him. If all the partners, or the firm as such, become bankrupt, it is
* 476 still true that the discharge of * one or more affects only those discharged. (*x*) If other partners are not discharged, each of them may be sued for the whole of the balance of the debt which remains unpaid. (*y*) The bankruptcy itself operates a discharge of an execution against the partnership, because it supersedes all remedies which any creditor resorts to, in favor of all the creditors, for whose equal benefit it takes possession of all the property. (*z*)

(*v*) "Where a defence can be made by one or more of the defendants, either by plea or by proof on the trial, which admits the making of the original joint contract, but shows matter of personal exemption or discharge, whether such exemption arises from an incapacity to contract (as in case of coverture or infancy), or by matter of subsequent discharge (as in case of bankruptcy), but which leaves the other contracting parties liable to the performance of the contract, such party may have a separate judgment against the plaintiff, and the plaintiff may have a valid judgment against the other contracting parties." Per Shaw, C. J., in Tuttle *v.* Cooper, 10 Pick. 291. [A discharge in bankruptcy granted to one member of a partnership, after he alone had been adjudged bankrupt, in a proceeding affecting him alone, to which his copartner was not a party, is not a bar to an action, against him and his copartners, by a partnership creditor, when the creditor shows affirmatively, that, at the time of the petition, there were partnership assets as well as partnership debts. Crompton *v.* Conkling, 15 N. B. R. 417, U. S. Dist. Ct. But see Wilkins *v.* Davis, id. 60; *In re* Jewett, id. 126, 139.]

(*w*) Mechanics' Bank *v.* Seton, 1 Pet. 299; Story *v.* Livingstone, 13 id. 359; Hussey *v.* Dole, 24 Me. 20; McConnell *v.* McConnell, 11 Vt. 290; Noyes *v.* Sawyer, 3 id. 160; Crocker *v.* Higgins, 7 Conn. 342; Hawley *v.* Cramer, 4 Cow. 717; Oliver *v.* Palmer, 11 Gill & J. 426; Park *v.* Ballentine, 6 Blackf. 223; West *v.* Randall, 2 Mass. 181.

(*x*) A partner who, after getting his certificate, has taken up the notes of the firm, is permitted to prove against the joint estate. Atkins *v.* Atkins, Buck, 479.

(*y*) *Ex parte* Bolton, Buck, 13; Heath *v.* Hall, 4 Taunt. 326; Sleech's Case, 1 Meriv. 570; Browne *v.* Carr, 7 Bing. 508.

(*z*) Barker *v.* Goodair, 11 Ves. 78; Dutton *v.* Morrison, 17 id. 193; *In re* Wait, 1 Jac. & W. 605.

There are many cases in England turning upon the right of the solvent partner to pay debts, or otherwise dispose of the common property, after an *act* of bankruptcy by a partner, but before a declared bankruptcy. There, as soon as the decree of bankruptcy is made, it goes back by relation, as we have before remarked, and makes the bankruptcy effectual from the first act of bankruptcy. And, with us, all transfers or payments before the bankruptcy, made in contemplation of it, or within a certain period before it, are avoided as against the general creditors. (*a*) We apprehend this rule, on principle, must apply here to the acts of the solvent partner. In general, these acts cannot affect the creditors of the firm, because the solvent partner is bound *in solido* to pay them. What he does, however, may waste his means, so that he ceases to be solvent, or it may indirectly affect the several debtors, by lessening a surplus of his interest in the joint fund to which they might look. But, to any questions of this kind, there is but one principle applicable in practice. It is, that the solvent partner has possession of, and full power over, all the effects of the partnership; after the bankruptcy is declared, that partnership is dissolved; and now this solvent partner holds and disposes of the effects, as trustee, for all interested. (*b*) And if, in the exercise of his undoubted * power, either be- *477 fore or after the declaration of bankruptcy, he commits a fraud, actual or constructive, all those whom it would injure may avoid it, or have their remedy against him for the damages it causes. (*c*)

A rule has been laid down in England, and referred to a special provision in what is there called Sir Samuel Romilly's act, which rests also on general principles and sound reason,

(*a*) Everett *v.* Stone, 3 Story, 446; Hassels *v.* Simpson, Doug. 92; McKenzie *v.* Garrison, 10 Rich. 234; Atkinson *v.* Farmers' Bank, Crabbe, 529; Fidgeon *v.* Sharp, 1 Marsh. 198.

(*b*) Fox *v.* Hanbury, Cowp. 445; Harvey *v.* Crickett, 5 Maule & S. 336; Parker *v.* Muggridge, 2 Story, 346; Woodbridge *v.* Swann, 4 B. & Ad. 633; *In re* Robinson, 1 Mont. & A. 18; Smith *v.* Oriell, 1 East, 368; De Tastet *v.* Carroll, 1 Stark. 88; *In re* Wait, 1 Jac. & W. 605. See Westcott *v.* Tyson, 38 Penn. 389, on the question of one of the insolvent partners assisting a third party in the purchase of the creditors' claim.

(*c*) Ramsbottom *v.* Duck, 1 Mont. on Part. 135, appendix; Biggs *v.* Fellows, 8 B. & C. 402. See Ransom *v.* Van Deventer, 41 Barb. 307; Walsh *v.* Kelly, 42 id. 98.

and has, we consider, been adopted in the jurisprudence of this country. It is this: Each partner is liable for all the debts of the firm; but each partner is liable, as a principal debtor, for his own share, and as a surety for the other partners for the remainder. Hence, a solvent partner who pays all the debts of the concern may prove, against assignees of the insolvent partner, that proportion of what the solvent partner has paid which the insolvent would have paid if also solvent. (*d*) Thus, if a firm consist of three persons, and owes large debts, two of the three become insolvent, and the third pays all the joint debts. He has paid one-third as his own debt, and two-thirds as the debts of the other partners, one-third each. But *it seems* that the solvent partner cannot consider the other two as sureties for each other to him. If, therefore, one of the two has a large separate estate, and the other little or nothing, all he can do is to prove his third against the one, and the other third against the other, although he may get no dividend on this latter third. This, at least, would seem to be the prevailing doctrine in the decided cases. (*e*) But Lord
*478 * Eldon expressed a different opinion, and remarked, that he thought the equity which made them sureties to each other for each other continued after the bankruptcy. (*f*) And this rule seems to have been applied in one case. (*g*)

(*d*) Watson *v.* Sheath, 4 Madd. 477; Butcher *v.* Forman, 6 Hill, 585, per Nelson, C. J.

(*e*) *Ex parte* Yonge, 3 Ves. & B. 35, called *Ex parte* Young in 2 Rose, 40; *Ex parte* Ogilby, 3 Ves. & B. 133, called *Ex parte* Ogilvy in 2 Rose, 177; Wood *v.* Dodgson, 2 Maule & S. 195; *Ex parte* Watson, Buck, 449. In *Ex parte* Taylor, 2 Rose, 175, a solvent partner was holden entitled to prove against the estate of a bankrupt copartner the amount of the balance due to him upon the partnership account, first satisfying the partnership debts, or indemnifying the bankrupt against them. And in *Ex parte* King, 17 Ves. 115, under a joint commission, the separate estate of one was determined to have a lien on the other's share of a surplus of the joint estate, in respect of a debt proved upon bills drawn by the one in the name of the firm for a separate debt; and that the joint creditors might come in with the separate creditors for the deficiency. See also *Ex parte* Reid, 2 Rose, 84.

(*f*) *Ex parte* Hunter, Buck, 552; *Ex parte* Smith, id. 492.

(*g*) *Ex parte* Plowden, 3 Mont. & A. 402, 2 Deac. 456. A., B., & C. being partners, A. and B. borrowed 10,000*l.* for the firm on mortgages of their separate estates. The firm became bankrupt; C. was wholly insolvent; and A.'s mortgaged estate pays more than his share of the debt. *Held*, A.'s estate has a claim to contribution from B.'s for the difference between what B.'s estate sells for and half the debt of 10,000*l.* Sir John Cross observed: "The rights of the parties are not altered by bankruptcy. The facts, therefore, are simply these: two co-debtors give mortgages as security on their several estates. As one failed to

The assignees and the creditors may lose their claim against a retiring partner for debts due from the partnership, by the assignees making themselves responsible. Thus, if after the retirement, and an agreement between the partners that the remaining partner shall continue the business and pay all the debts, and a part of that business was to act for the assignees in settlement of a bankrupt estate; and the assignees, knowing the retirement and agreement, continued to employ the remaining partner alone, and he became insolvent, and it turned out that the partnership owed a large balance to the estate or to the assignees, — the creditors have no power to hold the retiring partner, because the assignees have discharged him by their acts; but they will hold the assignees as personally responsible. (*h*) The court has gone so far as to permit a retiring partner to prove his claim against the bankrupt partner, although the debts of the firm were not paid, when the joint creditors have discharged the retiring partner, by directly or indirectly accepting the remaining partner as their only creditor, as by sanctioning by their conduct and acquiescence an *arrangement to that effect between the partners. (*i*) *479 Such a case must be rare, however.

This distinction seems also to be taken. If one is defrauded into advancing money to become a partner, and the fraudulent party becomes bankrupt, the defrauded party may prove against his estate for the amount he so advanced, unless he had held himself out as a partner. By so doing, even for a very short

make good the sum secured, the other has made up the difference, whereas the amount should be charged equally on the two estates. I am of opinion that, as the assignees have 2,771*l.* in their hands, the separate creditors of Jellicorse are entitled to that sum, after which his estate will have paid 1,000*l.* more than Kempson's; therefore the whole 2,771*l.*, subject to the claim for 159*l.*, should be paid over to the separate estate of Jellicorse."

(*h*) If an assignee under a commission of bankruptcy employs an agent to receive money, and he embezzles it, the assignee will be liable to make it good to the creditors, unless he consulted the body of the creditors in the appointment of the agent. *In re* Litchfield, 1 Atk. 87.

(*i*) *Ex parte* Grazebrook, *In re* Naylor, 2 Deac. & Ch. 186. In this case, A., being a dormant partner with B., dissolves the partnership, and B. is declared indebted to A. on balance. A. sues B. for balance, and receives *cognovit* for debt and costs. B. becomes bankrupt. *Held*, that A. is entitled to prove his debts against the estate, although some partnership debts are unpaid. See also Parker *v.* Ramsbottom, 3 B. & C. 257. And see *contra*, in case of ostensible partners, *Ex parte* Ellis, 2 Glyn & J. 312; *Ex parte* Carter, id. 233. And see *Ex parte* Moore, id. 166.

time, he had incurred the liabilities of a partner, and cannot prove in competition with joint creditors. (*j*) If a retiring partner has a covenant of the remaining partner to pay all the debts, but the remaining partner becomes bankrupt, leaving them or any of them unpaid, and the retiring partner is held to pay them, and does pay them, — for the amount he so pays he may prove against the several estate of the bankrupt partner. (*k*)

* 480 * We have already referred to the case, not unfrequently occurring, where there are two firms, with some persons who are partners in both. We have seen that no suit at law can be maintained between them; but a suit in equity may be. And whether one firm can prove against the other firm seems to be determined by the question, whether the one firm is liable for the joint debts of the other. That is, if the solvent firm must pay the debts of a bankrupt firm, it cannot prove against

(*j*) In *Ex parte* Broome, 1 Rose, 69, A., induced by the fraudulent representations of B. as to the profits of his business, gives him a certain sum of money for a share of it. On the discovery of the fraud, A. files a bill in equity for an account, to have the partnership declared void, and for a receiver. The receiver was ordered. B. becomes bankrupt. Petition by A. to be admitted to prove his commission refused, with liberty to make a claim. *Held*, that although A., as against B., might have an equity to say he never was a partner, it would be difficult to say so as against third persons. Lord Eldon expressed himself at first inclined to grant the prayer of the petition, provided the petitioner would abandon the suit in equity and the receiver, but took time to consider; and afterwards (observing that although the petitioner might have an equity to be considered as never having been a partner, yet that it was extremely difficult to say that, as to third persons, he was not a partner), made an order that the petitioner should be at liberty to enter a claim only for the amount of his demand, but not to prove with the separate creditors.

(*k*) Wood *v.* Dodgson, 2 Rose, 47. In this case, a partner continuing the business took an assignment of all the stock, &c., and covenanted to indemnify the retiring partner from the debts then owing from the partnership. The continuing partner became bankrupt, and obtained his certificate; and subsequently an action was commenced against the retiring partner, upon an acceptance of the partnership. *Held*, that no action would lie against the bankrupt upon the covenant, since, under 49 Geo. 3, ch. 121, § 8, the retiring partner might, on his liability, have resorted to and proved his debt under the commission, and was therefore barred by the certificate. See also *Ex parte* Young, 2 Rose, 40; *Ex parte* Hesham, 1 id. 146. So, one partner may agree to give a retiring partner a sum for the concern, though they knew the partnership to be insolvent (provided no fraud was intended), and the estate will be liable. *Ex parte* Peake, *In re* Lightoller, a bankrupt, 1 Madd. 346–354. See also Perring *v.* Hare, 2 Car. & P. 401; Whiting *v.* Furanet, 1 Conn. 60.

the estate of that firm in competition with the creditors whom the solvent firm must itself satisfy. (*l*)

It has been *held* that an agreement between one partner and a third person, that the latter shall share in the profits of the former, as profits, renders him liable as a partner to the creditors of the firm, although, as regards the other members of the firm, he is not their copartner. (*ll*)

SECTION III.

HOW THE FUNDS ARE APPROPRIATED TO THE DEBTS.

We have seen that the great majority of interesting questions concerning partnership fall within the jurisdiction of equity. This is still more the case with questions of bankruptcy, which go into equity almost exclusively. We might expect that questions which connect partnership with bankruptcy would be, more than most others, determined on equitable principles. Hence the rule is distinctly established in equity, that, in bankruptcy of a partnership, the joint property forms a fund appropriated to the joint creditors, and the several property of each creditor a several fund appropriated to the several creditors of each partner. And the joint creditors cannot go to the several property until the several creditors are paid in full, and there is a surplus over, by which the joint creditors may benefit. On the other hand, the several creditors cannot look to the joint fund until all the joint debts are paid, and there is a surplus; and then the several creditors of a partner may resort to that partner's interest in that surplus. (*m*) It has, however, been held

(*l*) *Ex parte* Adams, 1 Rose, 305. See also Cooke's Bankr. Laws, 538; *Ex parte* Hesham, 1 Rose, 146; *Ex parte* Cook, Mont. 228; Cases of Shakeshaft, Stirrup & Salisbury, 6 Ves. 123, 743, 747; *Ex parte* Hargreaves, 1 Cox, 440; *Ex parte* St. Barbe, 11 Ves. 413; *Ex parte* St. Johns, Cooke's B. L. 510; *Ex parte* Castell, *Ex parte* Stroud, 2 Glyn & J. 124, 127; *Ex parte* Sillitoe, 1 id. 374; *Ex parte* Williams, 3 Mont., Deac. & De G. 433; McCormick's Appeal, 55 Penn. St. 252.

(*ll*) Fitch *v.* Harrington, 13 Gray, 468. See, on the relative rights of creditors of the firm and creditors of the individual partners, Reeves *v.* Ayres, 38 Ill. 418; Lewis *v.* Conrad, 11 Iowa, 153; Levally *v.* Ellis, 13 id. 544; Jones *v.* Jones, id. 276. [A person who lends the entire capital to an individual partner, for the purpose of commencing business, has an equity equal to that of the creditors of the firm. Reeves *v.* Ayres, *ubi supra*.]

(*m*) *In re* Smith, 16 Johns. 102; Fox *v.* Hanbury, Cowp. 445; Moody *v.* Payne, 2 Johns. Ch. 548; Eddie *v.* Davidson, Doug. 650; Smith *v.* Stokes,

that, if one partner pays more than his share of the partnership debts, he has in equity a claim on the partnership property, superior to the claims of the separate creditors of the copartners. (*mm*)

It has been held that the separate creditors of a person who is a member of two partnerships have a preference as to his interest in property in one of the firms, as against creditors of the other firm. (*mmm*)

* 481 * So far as the inability of the several creditors to look to the joint fund until the payment of the debts leaves a surplus, the law also is quite settled. But it is not settled that the partnership creditors may not at law look to the several funds at once, in common with the several creditors. So far as the present weight of authority goes, it might seem that the joint creditors have this power. But of late the law, as we have said, seems distinctly tending to adopt this rule of equity, or rather this half of the equitable rule. (*n*) We have

1 East, 367; Wilson *v.* Gibbs, 2 Johns. 282; Taylor *v.* Fields, 4 Ves. 396; Chapman *v.* Koops, 3 Bos. & P. 289; Parker *v.* Pistor, id. 288; Croft *v.* Pyke, 3 P. Wms. 182; *Ex parte* Ruff, 6 Ves. 126; *Ex parte* Williams, 11 Ves. 5; West *v.* Skip, 1 Ves. Sen. 239, 242; Taylor *v.* Fields, 4 Ves. 396; see note to Young *v.* Keighly, 15 id. 559; Dutton *v.* Morrison, 17 id. 193–205; Watson *v.* Taylor, 2 Ves. & B. 299; King *v.* Sanderson, 1 Wightw. 50; The King *v.* Rock, 2 Price's Exch. 198; Barker *v.* Goodair, 11 Ves. 78–85; Church *v.* Knox, 2 Day, 514; Peirce *v.* Jackson, 6 Mass. 242; Wilson *v.* Conine, 2 Johns. 280; Knox *v.* Simmons, 4 Yeates, 477; Wallace *v.* Patterson, 2 Har. & McH. 463; Harrison *v.* Sterry, 5 Cranch, 289; McCoombe *v.* Dunch, 2 Dall. 73; Sanderson *v.* Stockdale, 11 Md. 563; Linford *v.* Linford, 4 Dutch. 113; Dunham *v.* Hanna, 18 Ind. 270; Tenney *v.* Johnson, 43 N. H. 144; Nixon *v.* Nash, 12 Ohio, 647. See Backus *v.* Murphy, 39 Penn. 397; Cope's Appeal, id. 284; Houseal & Smith's Appeal, 45 id. 484; Crawford *v.* Baum, 12 Rich. Law (S. C.), 75; Willis *v.* Freeman, 35 Vt. 44; Lewis *v.* Conrad, 11 Iowa, 481; and see *ante*, p. * 247. [The debt of a firm, which has advanced money to an individual member beyond his share of the capital, is a separate debt of the firm as against the partner receiving the same; and the assignee of the firm may prove the debt against the separate debtor partner, and be paid after the other separate copartnership creditors are paid, but not before. *In re* McLean, 15 N. B. R. 333, U. S. Dist. Ct. Del. Exemptions are not to be allowed out of the partnership estate. *In re* Croft, Ch. Leg. News, March 16, 1878.]

(*mm*) Crooker *v.* Crooker, 52 Me. 267.

(*mmm*) Weaver *v.* Weaver, 46 N. H. 188.

(*n*) Separate creditors cannot, in *bankruptcy*, take a dividend ratably with the joint creditors: each estate is applicable to its own debts. The usual directions are to apply the funds respectively; the joint to the joint debts, the separate to the separate debts, the surplus of each to the creditors remaining on the other. *Ex parte* Elton, 3 Ves. 38; [Rainey *v.* Nunse, 54 Ill. 29.] In a very late

touched upon this subject before, and now * will only *482
add, that in our judgment the other half without this half would be inequitable. We see no good reason for giving the joint creditors this advantage; none, that is, for confining the several creditors to the several fund, which does not equally require that the joint creditors should be confined to the joint fund. This whole rule in equity has not been established without conflict and fluctuation; and is not free now from doubt, in some minds, as to its justice, reasonableness, and expediency. We share these doubts in no degree whatever. It seems to us a simple rule, eminently practical, and founded upon principles of justice and of policy so certain and obvious that they upon whom the rule presses heavily are seldom disposed to question its general propriety. And we cannot but think that, as a rule of equity, it is impregnable, and that it will be recognized as a rule of law. (*o*)

case, Terry *v.* Butler, 43 Barb. S. C. 395, the court, in reversing a judgment, on appeal, observed: "But there is another branch of the case, in respect to which a serious difficulty exists, which does not seem to have been adverted to before the referees, and which requires a reversal of the judgment. The order appointing the plaintiff receiver was founded on a demand owing by Putnam & Butler as copartners. The property in the hands of the assignees, and which they are directed by the judgment herein to transfer to the plaintiff, is the separate property of Butler. The judgment, also, directs the plaintiff, as receiver, to apply the avails of said separate property to the payment of the said copartnership demand. In this respect, I think it is erroneous. In equity, the separate estate is not liable for partnership demands, until the partnership effects are exhausted and the separate debts are paid. In the case at bar, it appears sufficiently, perhaps, that the remedy at law against the partnership property has been exhausted by the proceedings had in the legal action against Putnam & Butler, set forth in the complaint and admitted on the trial. But there is no evidence that the separate debts of Butler have been paid. As the judgment makes no provision for the payment of the separate debts, but, in effect, postpones them until the plaintiff's claim against the firm is satisfied out of the separate estate, instead of directing payment of the plaintiff's demand out of the *surplus*, if any remains, after payment of the separate debts, it is, therefore, erroneous and must be set aside, and a new trial must be had." See also the authorities cited in the next preceding and succeeding notes. And see Moline Co. *v.* Webster, 26 Ill. 233; Pahlman *v.* Graves, id. 405; Weyer *v.* Thornburgh, 15 Ind. 124; Jackson *v.* Clymer, 43 Penn. 79; Black's Appeal, 44 id. 503; Heckman *v.* Messinger, 49 id. 465; Northern Bank of Kentucky *v.* Keizer, 2 Duvall, 169; Whitehead *v.* Chadwell, id. 432.

(*o*) The cases on these questions are very numerous. These questions have been considered, and the leading cases cited, *ante*, p. *347, et seq., and notes. They are also considered quite fully in Murray *v.* Murray, 5 Johns. Ch. 60; Bell *v.* Newman, 5 Serg. & R. 78; Allen *v.* Wells, 22 Pick. 450, where many of the conflicting cases

This rule can apply only where there are matters to which it can apply; as where there are joint debts and joint funds, and also several debts and several funds. It is, therefore, not properly an exception to the rule where there is no joint estate or no living solvent partner, or where there are no separate debts. These cases, which are sometimes called exceptions to the rule, should rather be thought to fall without the
*483 rule. (*p*) There is, however, * one technical exception recognized in England, — when a creditor of the partnership is a petitioner for a separate commission against a bankrupt partner, — which rests there on the technical reason, that a commission of bankruptcy is at once an action and an execution. This rule has not been recognized in practice in this country, so far as we know; nor does it seem to us to be supported by any substantial reasons or principles derivable from the law of bankruptcy in relation to partnership. (*q*)

are examined. In Jarvis *v.* Brooks, 3 Fost. 136, Perley, J., in delivering the opinion of the court, says: "The right of the partnership creditors to a preference in the application of the partnership funds having been admitted in this State, the question raised in this case is, whether the corresponding and correlative rule, giving a preference to the individual creditor over his debtor's separate estate, is also to be considered as having been adopted as a branch and member of the same equitable doctrine. If the preference is admitted in favor of the joint creditor, but denied to the separate creditor, the principle of equality and reciprocity, upon which the interference of equity with the legal rule has been vindicated in England, wholly fails. We have admitted the equitable rule, which takes away the separate creditor's legal right to satisfy his debt upon an undivided moiety of the partnership property. Principle, consistency, and equal justice to the separate creditors, would seem to require that we should also adopt the other branch of the same equitable doctrine, and there is no greater difficulty in administering one branch of the doctrine than the other; both may be directly asserted at law with equal convenience." See Sniffer *v.* Sass, 14 Rich. (S. C.) Law, 20.

(*p*) *Ex parte* Sadler, 15 Ves. 52; *Ex parte* Machell, 2 Ves. & B. 216; *Ex parte* Abel, 4 Ves. 837; *Ex parte* Clay, 6 id. 813; *Ex parte* Chandler, 9 id. 35; *Ex parte* Hall, id. 349; *Ex parte* Elton, 3 id. 238 and note (Sumner's ed.); *Ex parte* Hubbard, 13 id. 424. The principle that there should be no joint estate has been carried to such an extremely rigorous extent, that, in one case where the joint property was but 5*l.*, and in another only 1*l.* 11*s.* and 6*d.*, the joint creditors were refused permission to take dividends under the separate estate, so fine has the distinction been drawn. *Ex parte* Peake, 2 Rose, 54; *In re* Lee, id. note.

(*q*) *Ex parte* Crisp, 1 Atk. 133; *Ex parte* Hall, 9 Ves. 349; *Ex parte* Ackerman, 14 id. 604; *Ex parte* De Tastet, 1 Rose, 10, 17 Ves. 247. And see Murrill *v.* Neill, 8 How. S. C. 414–427; M'Culloh *v.* Dashiell, 1 Harris & G. 99; *Ex parte* Taitt, 16 Ves. 193; *Ex parte* Dewdney, 15 id. 499; *Ex parte* Chandler, 9 id. 35; *Ex parte* Crisp, Cooke's B. L. 17 Willes, 467.

If a partner becomes bankrupt, his assignees take only his interest in the joint property. (*r*) But it seems that, if a firm is bankrupt, all the property of the firm, and also all the several property of the partners, goes to the assignees. (*s*) Practically, and in this country, this can be the case only where the partners are also insolvent, or suppose themselves insolvent, or in danger of becoming so; that is, have not enough to pay all the debts of the firm, and all their several debts also. For as the solvent partners would all be held, finally, for the debts of the firm, they would pay them without its insolvency. Indeed, while the insolvency of a partner when the firm is solvent is no uncommon circumstance, the legal insolvency of a firm of which the partners are solvent and able to pay all the joint as well as several debts is unknown in practice. It has been held, that an assignment of a firm for the benefit of creditors would be regarded as a fraudulent conveyance, unless it included all the individual estate of the partners as well as the partnership property. (*ss*)

In England, by statute, joint creditors are entitled to prove under a separate commission for the purpose of voting in the choice of * assignees, and assenting to, or dissenting from, the certificate. (*t*) But there is no provision enabling separate creditors to prove for this purpose under a joint commission. The law as to them, therefore, stands as it was before, which prevents them from voting in the choice of assignees under a joint commission. (*u*) When there is no

* 484

(*r*) Parker *v.* Muggridge, 2 Story, 334. And subject to the same equities which affect the bankrupt or insolvent. Jewson *v.* Moulson, 2 Atk. 420; Jacobson *v.* Williams, 1 P. Wms. 382; Bosvil *v.* Brander, id. 458, and Mr. Cox's note; Burdon *v.* Dean, 2 Ves. Jr. 607; Mumford *v.* Murray, 1 Paige, 620; Smith *v.* Kane, 2 Paige, 303; Van Epps *v.* Van Deusen, 4 id. 64. See Lothrop *v.* Wightman, 41 Penn. 297.

(*s*) Judd *v* Gibbs, cited Hilliard on Bankr. 114; *Ex parte* Cook, 2 P. Wms. 500; *Ex parte* Bandier, 1 Atk. 98; Hague *v.* Rolleston, 4 Burr. 2174; Harrison *v.* Sterry, 5 Cranch, 239; Wharton *v.* Fisher, 2 Serg. & R. 178.

(*ss*) Citizens' Ins. Co. *v.* Wallis, 23 Md. 182.

(*t*) Before the statute they were not so entitled (*Ex parte* Simpson, 2 Rose, 338; *Ex parte* Taitt, 16 Ves. 193, note [Sumner's ed.]; *Ex parte* Wilson, 18 id. 439), unless there were no separate creditors to vote. *Ex parte* Jones, 18 Ves. 283; *Ex parte* Taylor, id. 284; *Ex parte* Laycock, 1 Rose, 32.

(*u*) *Ex parte* Parr, 18 Ves. 65, 1 Rose, 76; *Ex parte* Hamer, id. 321; *Ex parte* Jepson, 19 Ves. 224. Upon some occasions, if the interest of the separate creditors requires it, an order will be made, that an inspector shall be appointed for the separate estates,

statutory enactment in this country, making other provisions, we should consider the law to be as it was in England before the passage of the statute. (*uu*)

SECTION IV.

WHAT DEBTS OR FUNDS ARE JOINT, AND WHAT ARE SEVERAL.

It is important to determine what creditors belong to the one class or the other, and what funds belong to the one or the other, that they may be duly appropriated.

The question, whether a party is a joint creditor or a several creditor, resolves itself into two. One question is, Was the debt, as originally contracted, the debt of the partnership, or the debt of some one partner? (*v*) This must depend altogether upon the considerations which have already been presented, as to the liability of partners and of partnerships. They determine whether a certain debt, claimed to be that of a firm, was contracted by the firm, or by one person, partner or other, having authority to bind the firm in that way to that debt. Or whether a debt, claimed to be the several debt of a part-
* 485 ner, and, as such, entitled to priority upon * the several fund, was contracted by him alone, or by him for the firm, so as to make it legally the debt of the firm. In other words, these questions depend almost wholly upon the considerations which determine the authority of one who acts for a firm, or the liability of the members of the firm. And it does

as a check upon the proceedings of the assignees. *Ex parte* Batson, 1 Glyn & J. 269.

(*uu*) [The weight of authority favors the rule that a partnership creditor may prove his claim against the estate of an individual partner, and, of course, that such provable claim will be barred by the discharge. *In re* Jewett, 15 N. B. R. 126.]

(*v*) A., as a trader, being indebted to several persons, enters into partnership with B., and brings his stock in trade into the partnership. By the partnership articles, it was agreed that the joint trade should pay the creditors of A., named in a schedule. *Held*, that a separate creditor of A., named in the schedule, did not, by the articles, become a joint creditor of A. and B. This was on the ground of want of assent on the part of the creditors. Lord Eldon observed: "But I agree to the proposition, that a very little will do to make out an assent to the agreement. If any of the creditors named in the schedule think they can make out such a case, they may apply, on that ground, to prove their debts against the joint estate." *Ex parte* Williams, Buck, 13.

not seem necessary to add here any thing to what has been already said on these subjects. (*w*)

But the second of the two questions referred to is more difficult. It is whether a debt, which was originally a joint debt, has become a several debt, or whether a debt originally several has become joint. A part of this difficulty springs from the principle, that a firm is so far distinct from the members who compose it that a creditor of the firm may have the partnership and also the several security of the partners, or some of them, as sureties for the debt; and a creditor of one or more partners may have the liability of the firm as security for his debt. Hence, if a debt was originally of one kind, and the creditor can show indebtedness of the other kind for the same cause, the question may arise, whether the new indebtedness is in discharge and extinguishment of the old, or only by way of collateral security to the old. (*x*) For if after a dissolution the payee of a note of a firm gives it up, and takes the several notes of the partners for their several shares, he has no rights as a partnership creditor. (*xx*)

If the one indebtedness discharges the other, there must be, first, a consent of the creditor, and a consideration of some kind for the new indebtedness, and a consideration of some kind for the discharge of the old. (*y*) Thus, if a partner makes a purchase, *on his own account, and pays *486

(*w*) See cases cited in following note, for such further consideration of these points as may be thought necessary.

(*x*) *Ex parte* Whitmore, 3 Mont. & A. 627. This case is a leading and illustrative case; but, as questions arising under this branch of the law are largely governed by the special facts in the case, we give the principal authorities. *Ex parte* Nolte, 2 Glyn & J. 295; Thompson *v.* Percival, 5 B. & Ad. 925; Evans *v.* Drummond, 4 Esp. 89; Read *v.* White, 5 id. 122; Bedford *v.* Deakin, 2 Stark. 178, 2 B. & Ald. 210; Lodge *v.* Dicas, 3 B. & Ald. 611; David *v.* Ellice, 5 B. & C. 196; Kirwan *v.* Kirwan, 4 Tyrw. 491, 2 Cromp. & M. 617; Winter *v.* Innes, 4 Mylne & C. 101; Vulliamy *v.* Noble, 3 Meriv. 619; Sleech's Case in Devaynes *v.* Noble, 1 id. 565; *Ex parte* Kendall, 17 Ves. 514–527; Cowell *v.* Sikes, 2 Russ. 191; Wilkinson *v.* Henderson, 1 Mylne & K. 582–588; Braithwaite *v.* Britain, 1 Keen, 206–220; Hart *v.* Alexander, 2 M. & W. 484; Lyth *v.* Ault & Wood, 7 Exch. 669; Harris *v.* Farwell, 15 Eng. L. & Eq. 70, 15 Beav. 31; Yarnell *v.* Anderson, 14 Mo. 619; Smith *v.* Rogers, 17 Johns. 340.

(*xx*) Crooker *v.* Crooker, 52 Me. 267.

(*y*) But there must be an extinguishment of the original indebtedness. Cuxon *v.* Chadley, 3 B. & C. 591; Butterfield *v.* Hartshorn, 7 N. H. 345; Warren *v.* Batchelder, 15 N. H. 129; Wharton *v.* Walker, 4 B. & C. 163; Owen *v.* Bowen, 4 Car. & P. 93; Gibson *v.* Minet, 1 id. 247; McKinney *v.* Alvis, 14 Ill. 34.

for it by the note of the firm, which is all the creditor has, his possession of this note does not necessarily prove his discharge of the several partner. If he gives up the note of the partner, that would prove it; but if there was only a simple debt of that partner, as for a purchase, the note of the firm would not be a payment of this debt. In Maine and Massachusetts, there would be a presumption of payment, to be overcome only by proof of a different intention between the parties. (*z*) In other States, and in the federal courts, the general presumption, that a negotiable note is not payment, would apply, and could be rebutted only by proof that it was otherwise intended. (*a*) That is, we should say in such a case the creditor might consider the old debt as still existing, and claim as several creditor, if that would be for his advantage, giving up the company's note. If the intention of discharging the old debt by the new was made out by proof, or by presumption, the question would still occur as to the consideration; and we should say, that the getting all the partners, instead of a part, would be a consideration enough for the discharge by the creditor of the old debt; and, at the same time, if no especial consideration to the firm were proved, we should say that the discharge of the several indebtedness of the one partner would be a sufficient giving up of value by the creditor to make a consideration on which the firm would be held. (*b*)

(*z*) Butts *v.* Dean, 2 Metc. 76; Watkins *v.* Hill, 8 Pick. 522; Reed *v.* Upton, 10 id. 525; Maneely *v.* McGee, 6 Mass. 143; Wood *v.* Bodwell, 12 Pick. 268; Ilsley *v.* Jewett, 2 Metc. 168; Varner *v.* Nobleborough, 2 Greenl. 121 and note (*a*); Descadillas *v.* Harris, 8 id. 298; Newall *v.* Hussey, 18 Me. 249; Bangor *v.* Warren, 34 id. 324; Fowler *v.* Ludwig, id. 455; Shumway *v.* Reed, id. 560; Comstock *v.* Smith, 23 id. 302; Gooding *v.* Morgan, 37 id. 419.

(*a*) Peter *v.* Beverly, 10 Pet. 567; Sheehy *v.* Mandeville, 6 Cranch, 253; Wallace *v.* Agry, 4 Mason, 336; Smith *v.* Smith, 7 Fost. 244; Van Ostrand *v.* Reed, 1 Wend. 424; Burdick *v.* Green, 15 Johns. 247; Hughes *v.* Wheeler, 8 Cowen, 77; Booth *v.* Smith, 3 Wend. 66; Bill *v.* Porter, 9 Conn. 23; Davidson *v.* Bridgeport, 8 Conn. 472; Elliott *v.* Sleeper, 2 N. H. 525; Frisbie *v.* Larned, 21 Wend. 450; Cole *v.* Sackett, 1 Hill, 516; Waydell *v.* Luer, 5 id. 448. For the English law upon this point, see Crowe *v.* Clay, 9 Exch. 604, 25 Eng. L. & Eq. 454; Maxwell *v.* Deare, 8 Moore, P. C. 363, 26 Eng. L. & Eq. 56.

(*b*) *Ex parte* Williams, Buck, 16; *Ex parte* Seddon, 2 Cox, 49; *Ex parte* Lobb, 7 Ves. 592; Scaife *v.* Jackson, 5 Dow. & R. 290, 3 B. & C. 421; *Ex parte* Kedie, 2 Deac. & Ch. 321; *Ex parte* Jackson, 1 Ves. Jr. 131. And see cases in previous notes.

If the debt was originally joint, and had apparently become * several instead of joint, we apprehend that a * 487 distinct consent of the creditor to this arrangement, — by which he gives up all, and retains only one, — and a distinct consideration for his consent, must be proved. And this, of course, may be any benefit to him, actual or prospective; or any loss or injury to the firm, suffered at the instance of the creditor. A consideration to the several partner must, perhaps, also be proved; for, although he was held before, he had before, on payment, a right to charge his payment to the firm, which he has not now. (*c*)

In general, it would seem from the cases that, while a distinct intention, or consent and agreement, of all the partners must be proved, in order to give validity to an arrangement by which a new indebtedness has discharged an old one, or a joint debt been extinguished by conversion into a several debt, or *vice versâ*, — if such consent and agreement be proved, the court apply quite liberally the principle of novation, and consider the discharge of the one debt a sufficient consideration to sustain the assumption of the new debt. (*d*)

Whether or no such consent and discharge have taken place,

(*c*) Lyth *v.* Ault & Wood, 7 Exch. 669. Parke, B.: "The plaintiff agrees to take the security of one partner, instead of that of both. She is at liberty to enter into that arrangement; for the court cannot inquire into the value of the consideration. If there be any consideration whatever, it will support an agreement. Now, although 10*l.* would be no satisfaction for a debt of 100*l.*, yet an article of much less value than 10*l.* may be given and received in satisfaction of such a debt. It may, at first, appear paradoxical; but the sole responsibility of one of many partners may be of greater value than that of all, for you may thereby obtain the security of his real and personal estate." Pollock, C. B.: "The exchange may be of great advantage to the creditor; for it may be much more desirable to have the sole security of a rich old man, than the joint security of the old man, and of a young man without any property." Thompson *v.* Percival, 5 B. & Ad. 925; Hart *v.* Alexander, 2 M. & W. 484; Kirwan *v.* Kirwan, 2 Cromp. & M. 617, 4 Tyrw. 491. The authority of David *v.* Ellice, 5 B. & C. 196, 7 Dow. & R. 690, and Lodge *v.* Dicas, 3 B. & Ald. 611, is considered as greatly shaken by the later authorities. See Hart *v.* Alexander, 2 M. & W. 493; Sheehy *v.* Mandeville, 6 Cranch, 264; Harris *v.* Lindsay, 4 Wash. C. C. 271. But see Wildes *v.* Fessenden, 4 Metc. 12, reviewing the authorities. Robb *v.* Mudge, 14 Gray, 534; Wild *v.* Dean, 3 Allen, 579; *Ex parte* Appleby, 2 Deac. 482; *Ex parte* Liddiard, 4 Deac. & Ch. 603; *Ex parte* Kedie, 2 id. 312; *Ex parte* Lane, De Gex, 300; *Ex parte* Bradbury, 4 Deac. 202.

(*d*) Lyth *v.* Ault, 7 Exch. 669, *supra*, note (*c*); and the opinion of Alderson, B., p. 674. And see Andrew *v.* Boughey, Dyer, 75 *a*; Thompson *v.* Percival, 5 B. & Ad. 925; Mills *v.* Boyd, 6 Jur. 943 and cases there cited.

must depend upon considerations quite analogous to those
*488 which * have been presented in the inquiry when a retired partner was discharged from the liability of the firm, by change of charge, or credit, or account. The cases are rather numerous on this point; but it is not easy to draw from them any general principles other than those which have been already stated. (*e*)

If there be an old indebtedness, and a new one for the same cause, and it is not proved or presumed that the new has paid the old, then both co-exist; and, generally, in such case the old is the principal debt, and the new is collateral to and security for the old. The cases show that the question whether the old debt is extinguished is sometimes one of much difficulty in practice. But, if it be not extinguished, then it is certain that the creditor may give up the new debt, and found his claim only on the old. (*f*) In this country, it is a universal principle, recognized in all our systems of insolvency and in the national bankrupt law, that a creditor having a debt with security may

(*e*) Wild *v.* Dean, 5 Allen, 579. In this case, Bigelow, C. J., fully considers the conflicting authorities, and holds that a partnership debt is not provable against the private estate of one of the partners, who has received an assignment of all the partnership property, and executed a bond to his retiring partner to assume and pay the partnership debts, without evidence of an express or implied assent by him to pay the same to the creditor as his private debt; and that notice by the creditor of his election to treat it as a private debt is not sufficient. Robb *v.* Mudge, 14 Gray, 534; *Ex parte* Whitmore, 3 Mont. & A. 627; Evans *v.* Drummond, 4 Esp. 89; Read *v.* White, 5 id. 122; Bedford *v.* Deakin, 2 Stark. 178, 2 B. & Ald. 210; Lodge *v.* Dicas, 3 id. 611; Thompson *v.* Percival, 5 id. 925; Hart *v.* Alexander, 2 M. & W. 484.

(*f*) *Ex parte* Roxby, 1 Mont. on Part. 198. The petitioner, a joint creditor, took a draft of the solvent partners upon a third person. The petitioner applied to prove. The proof was refused, unless upon delivering up the draft. Petition to prove. Lord Chancellor: "The question is, whether the bill was given as a collateral security, or in discharge of the debt; as to which an affidavit must be made." *Ex parte* Hodgkinson, 1 Cooper, 101; *Ex parte* Kendall, 17 Ves. 527. Lord Eldon: "In many cases, the representative may be entitled to say to a creditor, who chooses to make the demand, that justice requires the surviving partners to pay the debt: they are to be considered the principals; he is merely a surety; and therefore a court of equity would not permit them to call upon him for payment, except upon an equitable arrangement and modification requiring them to assign the dividend." *Ex parte* Seddon, 2 Cox, 49; *Ex parte* Lobb, 7 Ves. 592; *Ex parte* Hay, 15 id. 4; *Ex parte* Slater, 6 id. 146; Evans *v.* Drummond, 1 B. & C. 113; Reed *v.* White, 5 Esp. 122; Thompson *v.* Percival, 5 B. & Ad. 925; *Ex parte* Whitmore, 3 Mont. & A. 627; Oakeley *v.* Pasheller, 10 Bligh, 548, 4 Clark & Fin. 207.

give up his security, and prove his whole debt; or may obtain what he can from his security, and prove for the balance. (*g*) We do not know that this principle has been applied
* to the case of a creditor of a partner, holding the lia- *489
bility of the firm as collateral security; and there might be some difficulty in this application of it. The simplest result would be, that the creditor should prove against the firm, and, deducting his dividend, then prove for the balance against the partner; but a difficulty in the way of such procedure leads to a doubt whether it would be permitted. (*h*)

We have supposed the indebtedness to be such that the liability of the firm and that of the partner cannot be called concurrent. Perhaps they would be so deemed; and if they

(*g*) Richardson *v.* Wyman, 4 Gray, 553. The question was before the court in this case, where the respondent held a joint and several note of three persons, tenants in common, and held also a mortgage security. The petitioners claimed that the security should first be made available, and the respondent be permitted then to prove against the insolvent estate of one of the debtors. The court said: "The property of the insolvent debtor, which is pledged for the payment of the debt, should either be applied to its extinguishment, or surrendered to the assignees and made part of the estate to be distributed among the general creditors; and whatever other property the creditor holds as security ought also to be appropriated to the payment of the debt. This is an equitable rule, which will do justice to all parties. It has the sanction, in its spirit, of the courts of chancery in England, and has been recognized and enforced in our own." Lanckton *v.* Wolcott, 6 Metc. 305; Amory *v.* Francis, 16 Mass. 308; *In re* Grant, 5 Law Rep. 303; *Ex parte* Baker, 8 id. 461; Eastman *v.* Foster, 8 Metc. 19. For English cases, see *Ex parte* Goodman, 3 Madd. 373; *Ex parte* Parr, 1 Rose, 76, 18 Ves. 65; *Ex parte* Bennet, 2 Atk. 527; *Ex parte* Wildman, 1 id. 109; *Ex parte* De Tastet, 1 Rose, 323; *Ex parte* Hedderley, 2 Mont., Deac. & DeG. 487; *Ex parte* Shepherd, id. 204; *Ex parte* Prescott, 4 Deac. & Ch. 23; *Ex parte* Dickson, 2 Mont. & A. 99; *Ex parte* Rufford, 1 Glyn & J. 41; Ward *v.* Dalton, 7 C. B. 643; *Ex parte* Bloxham, 6 Ves. 449, 600; *Ex parte* Barclay, 1 Glyn & J. 272; *Ex parte* Smith, 3 Bro. C. C. 46.

(*h*) Agawam Bank *v.* Morris, 4 Cush. 99. A partnership note having been indorsed by the payee to a third person, and by him indorsed to and discounted at a bank of which he was president, and one of the promisors having afterwards become insolvent, the bank proved the note as a claim against his estate. The solvent promisor afterwards, at the request of the second indorser, and for the purpose of securing him and the bank, but without the knowledge of the bank, gave him security applicable to the note in question, and also to another note held by the bank; such indorser promising to account to the promisor for the surplus of the security, if any. It was *held*, that the security was not given to the bank, but was a personal one to the second indorsee, and to indemnify him as such; and that a subsequent order of the commissioner, on the motion of the assignee, directing the note to be struck out of the list of claims proved, and disallowing the same, on the ground that the bank held collateral security therefor which had not been surrendered or applied, was erroneous. See also Barclay *v.* Phelps, 4 Metc. 397.

were, in fact or by construction, such that the creditor need not consider the one as principal, and be limited in his
* 490 claim in the other, as he * would be in a case of strict guaranty, — then it seems to be settled, although not without some doubt and objection of great weight, that the creditor can only elect to proceed against one, (*i*) and abandon his claim against the other party. In fewer words, if a creditor can elect, he must elect. This rule would seem to have been settled only on authority in England, — for the supposed analogy to a rule of law is surely insufficient for it, — and we doubt whether it has been yet established by practice in this country; nor are we confident that it will be. Lord Eldon appears to think that, aside from authority, if a creditor gets the security of a partner, and also the security of a firm for the same debt, by a valid contract, there is no reason why he may not prove against both, in the same way as if they were different and distinct persons. (*j*)

(*i*) *Ex parte* Bevan, 9 Ves. 222. Lord Eldon: "It is not necessary to decide the other question as to the joint and several proof. If it was, I am not perfectly satisfied with the authority that has been stated. The reasoning goes upon this: that a joint and separate action could not be brought at law. But surely the distinction is this: that, where a joint and separate bond is given, and another security, several from each, there, as two actions might be brought, the rule in bankruptcy should be different. I think I have heard, that, in the case cited in Pearce *v.* Williams, the only separate creditor was he who took out the commission; and it appears, by the book, that the joint creditors prayed that he might deliver over to them the effects; which was refused; and it was said that he should have the effects applied to his separate bond: and, if that is the case, the rule is quite right; for he would have a right to take the separate effects, if not to the detriment of other separate creditors." And in the same case, 10 Ves. 107, Lord Eldon again says: "The principle seems obvious; yet in bankruptcy, for some reason not very intelligible, it has been said the creditor should not have the benefit of the caution which he has used. I never could see why a creditor, having both a joint and a several security, should not go against both estates. But it is settled that he must elect."

(*j*) The case alluded to by Lord Eldon, as quoted in the previous note, is *Ex parte* Rowlandson, 3 P. Wms. 405. "The Lord Chancellor (Talbot) at first inclined to think that the petitioner, being a joint and a separate creditor, ought to be at liberty to come in under each of the commissioners, provided he received but a single satisfaction; but the next day his lordship *held*, that as at law, when A. and B. are bound jointly and severally to J. S., if J. S. sues A. and B. severally, he cannot sue them jointly; and, on the contrary, if he sues them jointly, he cannot sue them severally, but the one action may be pleaded in abatement of the other. (But, as to this, see Lechmere *v.* Fletcher, 1 Cromp. & M. 636.) So, by the same reason, the petitioner in the present case ought to be put to his election under which of the two commissions he would come; and that he should not be permitted to come under both, for then he would have received more than his share."

*It is also important to determine what constitutes *491
the fund appropriated to one class of creditors, and what that of the other class; or, to ascertain what is joint property and what is several property. Questions of fact, or even of law, as to the ownership of certain goods or effects or lands, are usually to be determined by the general principles of the law of contracts, or the law of property. But those which are peculiar to the law of partnership, or arise out of its relations, are also of much importance.

It seems to be *held* that if a partner takes property from the firm, even in good faith, and bankruptcy ensues, and the question arises, which class of creditors has the benefit of this property, it will be held to satisfy any balance due from that partner to the firm, and thus to increase the fund of the joint creditors, and the several creditors have only the surplus. As a general principle, this may rest upon sufficient reasons; for a partner should not be permitted to withdraw his share from the capital stock, and in this way assist his several creditors at the expense of the joint creditors. But the principle, or the rule, should not be extended to cases in which chattels were appropriated long ago to one partner, or bought by him with money taken from the firm, when the goods or money were duly charged to and allowed by him. If the rule were applied to such cases, a partner could have no several property, or it

And, notwithstanding the doubts of Lord Eldon and other high authorities, the rule is now firmly established in England, that, where there is a joint and several creditor, he must make his election whether he will come in upon the joint or the separate estate; that is, which he will come in upon, in preference; for, whichever he may elect, he will be entitled to come in upon the surplus of the other, if there should be any. *Ex parte* Blankenhagen, Cooke's B. L. 257; *Ex parte* Butlin, id.; *Ex parte* Banks, 1 Atk. 106; *Ex parte* Bond, id. 98; *Ex parte* Smith, 1 P. Wms. 237; *Ex parte* Masson, 1 Rose, 159; *Ex parte* Liddel, 2 id. 34; *Ex parte* Bank of England, id. 82; *Ex parte* Husband, 2 Glyn & J. 4, 5 Madd. 419; *Ex parte* Moult, Mont. 337; *Ex parte* Chevalier, 1 Mont. & A. 345; *Ex parte* Hinton, 1 De Gex, 550; *Ex parte* Ladbroke, 2 Glyn & J. 81; *Ex parte* Bate, 3 Deac. 358; *Ex parte* Smith, 1 id. 385; *Ex parte* Hill, 3 Mont. & A. 175; *Ex parte* Clarke, 1 De Gex, 153; *Ex parte* Wood, id. 134; *Ex parte* Banks, 2 Jones & La T. 212. *Ex parte* Lane, 1 De Gex, 300; *Ex parte* Arborim, id. 359; *Ex parte* Hay, 15 Ves. 4; *Ex parte* Adam, 1 Ves. & B. 493, 2 Rose, 36; *Ex parte* Bigg, id. 37; *Ex parte* Gray, 4 Deac. & Ch. 778. But where the contract is for double security against distinct firms, though consisting of the same individuals, the creditor, if ignorant of their connection, may prove against both. *Ex parte* Bevan, 10 Ves. 109, note to Sumner's ed. And see *Ex parte* Adam, 1 Ves. & B. 493, 2 Rose, 36; *Ex parte* Bigg, id. 37; *Ex parte* La Foret, Cooke's B. L. 251; *Ex parte* Walker, 1 Rose, 441.

would be so mixed up with that which would be restored
* 492 to the joint fund that no line of separation * could be found. Indeed, it seems to be limited to those cases in which certain specific property has been taken out, which has been identified, and may be specifically restored. Even here, however, the rule must be qualified, or rather another rule substituted, which may be drawn from the true principles of the case. (*k*)

It cannot be doubted that partners may agree in their original articles as to what property shall belong to one or another in case of dissolution; or that they may so agree subsequently to the formation of the partnership; or that they may so agree in reference to the present and immediate several ownership of articles of joint property, at any time or in any way they please; with this limitation only, that the agreement must be made in good faith, and therefore must not be made in contemplation of bankruptcy. The same power and right exist in relation to choses in action; any division or appropriation of these, by indorsement of negotiable paper, or assignment of debt, or otherwise, must be lawful and effectual, with only the same limitation. (*l*) And if a partner owns in this way, or in any other way, land or personalty, his right and interest cannot be affected by permitting the partnership to use or employ his property, upon any terms satisfactory to them, always within the limitation that the whole transaction was in perfect good faith. And the converse of all this must be equally true; that is, partners may transfer to the firm, either realty or personalty, choses in possession or choses in action, and the use or employment by a partner of the thing so owned by the firm cannot affect the

(*k*) In *Ex parte* Smith, 1 Gill & J. 74, it was *held*, that if one partner be intrusted with the entire management of the partnership concern, and he withdraw moneys for his separate use, which he duly and openly enters in the partnership books, this is not a fraud which will entitle the joint estate to prove against the separate; otherwise, if by the entries in the books he disguises the transaction, or wholly omits and conceals it. *Ex parte* Lodge, 1 Ves. Jr. 166; M'Cauley *v.* M'Farlane, 2 Desaus. Ch. 239; *Ex parte* Cust, 1 Cooke's B. L. 548.

(*l*) *Ex parte* Lodge, 1 Ves. Jr. 166; *Ex parte* Harris, 2 Ves. & B. 213; *Ex parte* Yonge, 3 id. 34; *Ex parte* Reeve, 9 Ves. 589; *Ex parte* Smith, 6 Madd. 2, s. c., *semble*, 1 Glyn & J. 74. See also notes 3 and 4 to Hankay *v.* Garratt, 1 Ves. Jr. 241 (Sumner's ed.); Anderson *v.* Maltby, 4 Bro. C. C. 423, 2 Ves. Jr. 244; Parker *v.* Ramsbottom, 3 B. & C. 257; *Ex parte* Carpenter, 1 Mont. & McA. 1; *Ex parte* Peake, 1 Madd. 346; Lingen *v.* Simpson, 1 Sim. & Stuart, 600; *Ex parte* Turner, 4 Deac. & Ch. 169, 177.

interest or diminish the rights of the firm, — always, we repeat, within the limitation of the entire honesty of this transfer * and this use, and its complete independence * 493 of all bankruptcy, or expectation of bankruptcy. (*m*)

If, after such appropriations have taken place, bankruptcy ensues, it will raise the question of their effect. We think the true answer must be, that the question of their original validity comes first. To determine this, we must inquire whether any thing of fraud, actual or constructive, entered into the transaction ; was bankruptcy contemplated ; or was it so near that it ought to have been contemplated ; (*n*) or are there any other circumstances to indicate that the transaction was something else than an honest transfer of property, by those who had a right to transfer, to those who had a right to receive it. If the original transaction was wholly free from any taint of this kind, we cannot see any sound principle in the law of partnership, or in the law of bankruptcy, which should interfere with the consequences of the transfer. And therefore the property would remain within the joint fund, or in the several fund, accordingly as it had been placed by the transfer in one or in the other. We should express the general rule thus: If the firm and all the partners are bankrupt, no separate estate of a

(*m*) *Ex parte* Ruffin, 6 Ves. 119; *Ex parte* Freeman, Buck, 471; *Ex parte* Peake, 1 Madd. 346, 589; *Ex parte* Fry, 1 Glyn & J. 96; Campbell *v.* Mullett, 2 Swanst. 575; *Ex parte* Williams, 11 Ves. 3; *Ex parte* Rowlandson, 1 Rose, 416; *Ex parte* Fell, 10 Ves. 347; *Ex parte* Hare, 2 Mont. & A. 478; *Ex parte* Hunter, 2 Rose, 382; *Ex parte* Jackson, 1 Ves. 131; *Ex parte* Burn, 1 Jac. & W. 378; *Ex parte* Jones, 4 Maule & S. 450; *Ex parte* Yallop, 15 Ves. 60; *Ex parte* Houghton, 17 id. 252; Horn *v.* Baker, 9 East, 215; *Ex parte* Parry, 5 Ves. 575; *Ex parte* Watkins, 1 Mont. & McA. 57. [But all the partners of an insolvent partnership cannot assign the property of the firm to pay the debts of one individual partner. Wilson *v.* Robertson, 21 N. Y. 587; Keith *v.* Fink, 47 Ill. 272. See also Nat. Bank *v.* Sprague, 20 N. J. Eq. 13.]

(*n*) It is the prevailing rule, conformably to the usual phraseology of bankrupt and insolvent laws, that a conveyance, in order to constitute preference, must be in actual contemplation of legal bankruptcy or insolvency. Thus, in England, it is said, that the law does not avoid a conveyance, made under circumstances in which the party may "hope that his affairs would rally and come round again." Green *v.* Bradfield, 1 Car. & K. 454, per Tindal, C. J. It must be an act that not only in effect contravenes the bankrupt laws, but it must be done with intent to contravene them, and in contemplation of bankruptcy. Hilliard on Bankr. 329; Fidgeon *v.* Sharp, 1 Marsh. 198, per Gibbs, C. J.; Phœnix *v.* Ingraham, 5 Johns. 412. And see Pearsall *v.* McCartney, 28 Ala. 110; Cole *v.* Albers, 1 Gill, 412; Jones *v.* Howland, 8 Metc. 377.

partner can claim against the joint estate, nor the joint estate against any separate estate, until all the creditors to whom the fund is primarily appropriated are paid in full with interest. (*o*) But if any property appears in either of these
*494 * estates, which has been fraudulently abstracted from any other, it must be restored; and this fraud may be constructive only, and any act would be so which violated the articles or agreement of the partners, or abstracted or appropriated property or funds by the act of one partner only, without the authority, consent, or knowledge of the others. (*p*) Whether partnership assets are subject to the exemption or homestead rights of a partner is not certain on authority. We should say, on general principles they are not. But it might depend somewhat on the language of the statutes creating those rights. (*pp*)

The English "statute of reputed ownership," as it is commonly called, contains provisions which bear upon this question. (*q*) It enacts that goods which at the time of the

(*o*) Per Lord Loughborough, *Ex parte* Elton, 3 Ves. 242; Twiss *v.* Massey, 1 Atk. 67; *Ex parte* Cook, 2 P. Wms. 500; *Ex parte* Abell, 4 Ves. 837; *Ex parte* Clay, 6 id. 833; Bolton *v.* Puller, 1 Bos. & P. 539–545. And see *In re* Howland, Law Rep. 1 Ch. 421, and Rolfe *v.* Flower, Law Rep. 1 P. C. 27.

(*p*) *In re* Lodge, 1 Ves. Jr. 165; *Ex parte* Harris, 1 Rose, 129, 437, Lord Eldon: "I take it now to be necessary, attending to the result of Lord Thurlow's decisions, *In re* Lodge, and the other cases, that, in order to establish a right of proof for the joint estate against the separate estate or for the separate estate against the joint estate, it must be made out that the money was taken improperly and fraudulently. In this sense, improperly and fraudulently that it was taken against the contract between the parties, express or implied; or as against an individual partner, to increase his private estate. I have oftener than once expressed my confirmation of that opinion, that those circumstances would, in a legal sense, constitute fraud. Cases of this kind, however, must be decided upon their particular circumstances; and the conclusion of law as to fraud must depend upon the nature of those circumstances." *Ex parte* Smith, 1 Glyn & J. 74; *Ex parte* Watkins, 1 Mont. & McA. 57.

(*pp*) [Whether a partner can claim homestead and exemption rights out of partnership assets, is a much debated and quite unsettled question. That he can, see Stewart *v.* Brown, 37 N. Y. 350; Servant *v.* Rusk, 43 Cal. 235; *In re* Richardson, 11 N. B. R. 114; Bonsall *v.* Comly, 44 Penn. St. 442. That he cannot, see Pond *v.* Kimball, 101 Mass. 105; Amphlett *v.* H bbard, 29 Mich. 298; Clegg *v.* Houston, 1 Phila. 352; Wright *v.* Pratt, 31 Wis. 99; Burns *v.* Harris, 67 N. C. 140; *In re* Blodgett, 10 N. B. R. 145; Till's Case, 3 Neb. 261; Gaylord *v.* Imhoff, 26 Ohio, 317; *In re* Brothroyd, 14 N. B. R. 323. A retiring partner from an insolvent firm cannot take any money with him; and, if he do, and place it in a homestead, equity will take it for the benefit of the firm's creditors. *In re* Sauthoff, 16 N. B. R. 181, U. S. Dist. Ct. Wis.]

(*q*) This statute, 6 Geo. 4, c. 16, § 3, provides that a fraudulent convey-

bankruptcy are in the possession, order, and disposition of the bankrupt, as reputed owner thereof, by consent of the true owner, shall be distributable as the property of the bankruptcy among his creditors. This statute was first enacted in the reign of James I., and has been confirmed by 6 Geo. 4. The statute of James was never adopted in this country, as we had no bankrupt law here until after our independence. Nor is there a similar provision in our bankrupt law. It is plain, however, that the principle of this statute is, to a considerable extent, one of common law; and its purpose is one which might in many cases be asserted by a court of equity, without any special statute. (*r*) * Indeed, this principle is the same with that which holds a person as a partner who has been, with his own consent, held out as one. For such a person is so held because the creditors of the firm trusted the firm on the credit of his membership, or, in other words, trusted him; and did this by his permission and authority. (*s*) If, therefore, this person, instead of permitting himself to be held out as a partner, permits his property to be held out as the property of the firm, and as forming a part of the foundation on which its credit rests, the very same reason which held him personally in the first case, with all his property, would now hold that part of his property so permitted to appear as the property of the firm. We cannot, therefore, doubt that equity would decide such a case very much in accordance with the general purpose of this law, although we doubt whether any

* 495

ance, "within this country or elsewhere," should constitute an act of bankruptcy. This language was used to meet a decision under previous statutes (Ingliss *v.* Grant, 5 T. R. 530), that a conveyance made in India by one residing there, though trading with England, could not constitute an act of bankruptcy.

(*r*) Storrs *v.* Barker, 6 Johns. Ch. 166; Wendell *v.* Van Rensselaer, 1 id. 344; East India Co. *v.* Vincent, 2 Atk. 83; Hanning *v.* Ferrers, 1 Eq. Cas. Abr. 356, pl. 10; Gilbert's Eq. Cas. 83; Raw *v.* Potts, Prec. in Ch. 35; Hunsden *v.* Cheyney, 2 Vern. 150; Styles *v.* Cowper, 3 Atk. 692; Jackson *v.* Cator, 5 Ves. 688; Dann *v.* Spurrier, 7 id. 231; Raw *v.* Pole, 2 Vern. 239. In the application of this principle, at common law, see Pickard *v.* Sears, 6 Adol. & E. 469–474; Heane *v.* Rogers, 9 B. & C. 586; Graves *v.* Key, 3 B. & Ad. 318, *a*.

(*s*) Spencer *v.* Billing, 3 Camp. 310; Parker *v.* Barker, 1 Brod. & B. 9, 3 Moore, 226; *Ex parte* Langdale, 18 Ves. 301; Guidon *v.* Robson, 2 Camp. 302; Parsons *v.* Crosby, 5 Esp. 199; McIver *v.* Humble, 16 East, 174; Smith *v.* Watson, 2 B. & C. 411; Waugh *v.* Carver, 2 H. Bl. 235; De Berkom *v.* Smith, per Lord Kenyon, 1 Esp. 29.

court would, in this country, without the direction or authorization of a statute, carry this principle so far as it has been applied in some cases, under the statute, in England. (*t*)

In the cases under this statute, (*u*) it has been repeatedly held that property passed in this way to the creditors of the firm, although there was no imputation of fraud upon the actual owner. He may have had excellent reasons for placing
* 496 his property in the * possession or at the disposal of the firm: the only inquiry was, Has he done so? for, if he has, he has placed it within reach of the creditors of the firm. (*v*) We do not, however, see that at common law, or in equity, there needs to be actual fraud, any more than in the analogous case of one held personally a partner because he permits himself to be so held out. If, for any reason whatever, he permits his property to enlarge the credit of the firm, either he intends that it shall be liable for the debts contracted on that credit, or he does not. If he so intends, there is no fraud of any kind; and the law accepts his intention and will carry

(*t*) The cases in equity collected in our notes may perhaps go no further than to hold, that, where the real owner of the property stands by and virtually assents to its sale by the reputed owners, it is a fraud on the purchaser, and the real owner is estopped from subsequently setting up title. This would be the rule here. The principle is well stated by Chancellor Kent, in Storrs *v.* Barker, 6 Johns. Ch. 168.

(*u*) By Stat. 6 Geo. 4, ch. 16, § 72, it is enacted, "that if any bankrupt, at the time he becomes bankrupt, shall, by consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition, as owner, the commissioners shall have power to sell and dispose of the same, for the benefit of the creditors, under the commission; provided that nothing herein contained shall invalidate or effect any transfer or assignment of any ship or vessel," &c. By section 1st of this statute, the statute 21 Jac. 1, ch. 19, is repealed; but the 11th section of the statute of James is re-enacted by the 72d section of the repealing statute, almost *in totidem verbis*. The adjudged cases, therefore, which were decided with reference to the statute of James are equally applicable to the statute of Geo. IV.

(*v*) Horn *v.* Baker, 9 East, 218; *Ex parte* Fell, 10 Ves. 348; *Ex parte* Rowlandson, 1 Rose, 419; *Ex parte* Williams, 11 Ves. 7; *Ex parte* Enderby, 2 B. & C. 389; Jones *v.* Dwyer, 15 East, 21; *Ex parte* Smith, 3 Madd. 63, Buck, 149; Storer *v.* Hunter, 3 B. & C. 368; *Ex parte* Arbonin, 1 De Gex, 359; *Ex parte* Lawrence, id. 269; *Ex parte* Castle, 3 Mont., Deac. & De G. 117; *Ex parte* Burn, 1 Jac. & W. 378; *Ex parte* Jones, 4 Maule & S. 450, overruling *Ex parte* Yallop, 15 Ves. 60, and *Ex parte* Houghton, 17 id. 252. See also Robinson *v.* McDonnell, 5 Maule & S. 228; Hay *v.* Fairbairn, 2 B. & Ald. 193; Monkhouse *v.* Hay, 2 Brod. & B. 114; Kirkley *v.* Hodgson, 1 B. & C. 580. By the statute 6 Geo. 4, exception is now made in case of ships, as will be observed.

it into effect. If he does not so intend, then he commits a constructive fraud upon the creditors; and the law, or, if law cannot, equity, will give to those creditors the benefit of that property. (*w*)

The important consequences of the statute in England fall upon retiring partners, and especially upon retiring dormant partners, who leave their property in the possession or at the disposal of the firm. And it is obvious that these are the parties, of all others, upon whom these consequences should fall. If a known partner retires and carries his personal credit out of the firm, but chooses to leave the credit of his property in the firm, certainly he cannot complain if they who accept this credit and act upon it are held in law to be entitled to the advantage of it. (*x*) He should, * therefore, not * 497 only give such notice of his retirement as will prevent his personal liability from attaching to future contracts, but he should withdraw all his property, and thus prevent the credit of this property from so attaching. Or, if he cannot or will not so withdraw his property at once, perhaps a sufficient notice that the property so left is his, and is not left with the firm for them to trade on the credit of it, might save his property from creditors who come in after the retirement. This may be difficult; and the case of the dormant or unknown partner is still more difficult. He, it seems, may by his retirement alone, without notice, cut off his liability for future debts. He has never contributed to the firm any credit but that of his property ostensibly in their possession as their own. If he now leaves this property in their hands, he leaves with it all this

(*w*) Independently of any consideration of bankruptcy, it is a general rule of law that all secret sales and transfers of personal chattels, unaccompanied by possession, are at least *primâ facie* fraudulent and void as against creditors; since the effect of them is to enable a party to gain a false credit from the world. 1 Deacon B. L. 406; Hoffman *v.* Pitt, 5 Esp. 25; Eastwood *v.* Brown, 1 Ryan & M. 312; per Buller, J., in Hodsden *v.* Staple, 2 T. R. 697; Bamford *v.* Baron, id. 594, note; and see Worsley *v.* De Mattos, 1 Burr. 467.

(*x*) *Ex parte* Chuck, 8 Bing. 469; *Ex parte* Wood, 1 De Gex, 134; *Ex parte* Gurney, 3 Mont., Deac. & De G. 541; *Ex parte* Thomas, id. 40, affirming s. c. 2 id. 294; *Ex parte* Hallifax, id. 544; Bannatyne *v.* Leader, 10 Sim. 350; *Ex parte* Heath, 4 Jur. 28; *Ex parte* Simpson, Mont. & Ch. 662; *Ex parte* Taylor, Mont. 240; *Ex parte* Dyster, 2 Rose, 256: but see Caldwell *v.* Gregory, id. 149; Curtis *v.* Perry, 6 Ves. 747; *Ex parte* Fell, 10 id. 347.

credit, and it is bound to make this credit good. In such case, if he undertakes to protect his property against this risk, it would seem that he must give notice of his past relations and liabilities, and that he has terminated them by retirement, and leaves his property there for certain reasons, but not to be liable as the property of the firm. It may be doubted whether even this would save his property as against the statute, although it might be enough at common law or in equity if there were no statute. (*y*)

*498 It not unfrequently happens that persons who actually are in * partnership, and in one firm, appear to the world as distinct traders, or as distinct firms, for the convenience and advantage of using the names separately upon negotiable paper. Thus, if there are three partners who call themselves so, they could use only the name of A., B., & Co. But, if not known as partners, A. may draw on B. in favor of C., and B. may accept and C. indorse, and the paper have apparently three distinct liabilities. The question then may arise, May the holder proceed against the several estates of all these persons, or only against the joint fund of their firm? (*z*)

(*y*) *Ex parte* Woodgate, 2 Mont., Deac. & De G. 394. A dissolution of partnership was advertised in the Gazette, and a circular sent in the name of the dissolved firm, requesting debtors of the firm to pay their debts to one partner. *Held*, that the notice was insufficient to take the debts out of the reputed ownership of the firm. The plant and stock in trade was taken possession of by the same partner, and used in his separate trade after the dissolution. *Held*, that it was in his separate reputed ownership. *Ex parte* Sprague, 4 De Gex, M. & G. 866. And see Hunter *v.* Rice, 15 East, 100; *Ex parte* Wheeler, Buck, 25; *Ex parte* Clarkson, 4 Deac. & Ch. 56; *Ex parte* Enderby, 2 B. & C. 89; *Ex parte* Arbonin, 1 De Gex, 359; *Ex parte* Ruffin, 6 Ves. 119; *Ex parte* Fell, 10 id. 347; *Ex parte* Williams, 11 id. 3; Joy *v.* Campbell, 1 Schoales & L. 328; *Ex parte* Burton, 1 Glyn & J. 207; *Ex parte* Usborne, id. 358; *Ex parte* Cooper, 1 Mont., Deac. & De G. 358. And see further, on the effect of notice or want of notice bearing on reputed ownership, *Ex parte* Barnett, 1 De Gex, 194; *Ex parte* Wood, 3 Mont., Deac. & De G. 314; *Ex parte* Arkwright, id. 129; *Ex parte* Wilkinson, 13 Sim. 475; *Ex parte* Pott, 2 id. 257, recognizing the rule in Williams *v.* Thorp, id. 263; and overruling *Ex parte* Smith, id. 357; *Ex parte* Nutting, 2 Mont., Deac. & De G. 302; *Ex parte* Usborne, 1 Glyn & J. 358; *Ex parte* Burton, id. 207.

(*z*) B. & G. carry on business at Manchester as commission agents, under the firm of B. & Co., G. being also a trader on his own separate account at Stockport, under the firm of J. & Co., and being likewise a partner with J. in London, trading under the firm of J. & Co., and with S. R. at Stockport, trading under the firm of S. R. B. & Co. drew two bills upon J. & Co., payable to the order of B. & Co., which J. & Co. accept, and which are afterwards indorsed by B. & Co., G. & Co.,

The authorities on this point are conflicting; nor do they cover the whole ground. We would state the result, however, thus: If the holder took the paper on the credit of the several names, and in ignorance of their joint interest, he certainly may prove against all the parties severally. But he may elect to proceed against the firm, or the joint fund, because what he held was in fact partnership paper. (*a*) If he took the paper *knowing that these names were the names of part- * 499
ners, it is much more doubtful whether he can now

and S. R.; and of which W. & Co. became the holders for a valuable consideration, without any knowledge that G. was a partner in the house of B. & Co., or in that of J. & Co. B. & G. and J. severally became bankrupt. The judges were equally divided on the question, whether W. & Co. could prove the amount of the bills both against the joint estate of B. & G. and the separate estate of G., or whether they must elect. But *held*, by all the judges, that the amount of dividends, which had been previously declared, though not received by W. & Co., under the commission against J., must be deducted from such proof. *Ex parte* Moult, 1 Deac. & Ch. 44, Mont. 321. The question is very elaborately argued by Erskine, C. J., and Sir George Rose, that W. & Co. must elect; and, on a rehearing before the Lord Chancellor, it was so decided. 2 Deac. & Ch. 419, Mont. & B. 28.

(*a*) A. & B. were in partnership, B. being a secret partner; and A., on the partnership account, drew bills in his own name on B., which were accepted by him. *Held*, on the bankruptcy of A. & B., that the holder of these bills, who was ignorant of the partnership, was not entitled to prove them against the joint estate of A. & B. and the separate estate of B., but that he was entitled to prove them against the separate estates of A. & B., *held*, too, that the holder, having proved against the joint estate, might, after a declaration of the dividend of the joint estate, retire from that proof, and prove against the separate estate. *Ex parte* Husbands, 2 Glyn & J. 4, reversing s. c. 5 Madd. 419. The Lord Chancellor said: "The circumstances of this case are peculiar, and create some embarrassment in the application of well-known principles of the bankrupt law. It is clear, that where a party takes a bill, drawn by some members of a firm, carrying on a distinct trade, on the firm, in ignorance that the drawers constitute part of the firm of the acceptors, proof is admitted against both the drawers and acceptors; and it is equally clear, that a person holding a joint and separate security for the same debt is in bankruptcy bound to elect. In this case, however, the bills are accepted by the dormant partner of the partnership of Isaac and Peter Blackburn, carrying on business in the name of Isaac Blackburn; and are drawn by Isaac Blackburn, in his individual name indeed, but, as I must take it on the evidence, in his name as representing the firm of the two bankrupts. It does not appear to me that this case ranges itself within that class of cases in which, contrary to the ordinary rule in bankruptcy, the holder has been allowed to pursue the contract appearing on the face of the bills, and to have double proof. But I do not think that the petitioners are concluded by any thing that has passed, so as to be prevented now from withdrawing the proof against the joint estate, and being admitted as creditors on the two separate estates." See the cases cited in the following notes, for a full consideration of these questions.

proceed against the parties severally. There are *dicta* of great weight (*b*) in favor of his right, but little or no adjudication. We think the test would be the actual character of the paper. If this was in fact partnership paper, and the holder knew that the names were those of partners, we think he has only the right which attaches to partnership paper; and if the holder knew also that it was partnership paper, as well as that it bore the names of partners, we should be quite certain of this. If, however, the paper was not partnership paper, but the paper of one of the persons, or of one of the firms placing their names on it, then we should say that the holder could proceed against them severally, although they were partners otherwise, and he knew that they were so. (*c*)

If a firm be indebted to one of the partners, it has been supposed (*d*) that this debt formed a part of the several assets of that partner, and that his several creditors might, therefore, prove against the joint fund, for that debt, in competition with the joint creditors. But that partner, if solvent, could
* 500 not himself prove *against the joint fund, to the injury of the joint creditors, because he is himself liable to those creditors; and the several creditors of that partner take on his insolvency only his rights; and therefore it seems now to be settled, that they cannot prove against the joint fund, in such a case. (*e*) If, on the other hand, a partner owes a balance

(*b*) These are collected and commented on in *Ex parte* Moult, 2 Deac. & Ch. 419.

(*c*) *Ex parte* Moult, 1 Deac. & Ch. 44, Mont. 321, and s. c. 2 Deac. & Ch. 419, Mont. & B. 28; *Ex parte* Sillitoe, 1 Glyn & J. 383; *In re* Shakeshaft, Stirrup, & Salisbury, cited in Curtis *v.* Perry, 6 Ves. 743, 747; *Ex parte* Adam, 2 Rose, 36, 1 Ves. & B. 493; *Ex parte* Bigg, 2 Rose, 37; *Ex parte* Walker, 1 id. 441; *Ex parte* Liddel, 2 id. 34; *Ex parte* Husbands, 5 Madd. 419, s. c. on appeal, 2 Glyn & J. 4; *Ex parte* La Forest, 1 Cooke B. L. 276; *Ex parte* Benson, 1 Cooke, 278; *Ex parte* The Bank of England, 2 Rose, 82; *Ex parte* Rowlandson, 3 P. Wms. 405; *Ex parte* Bonbonus, 3 Ves. 546; *Ex parte* Blackburn, 10 id. 204; *Ex parte* Bond, 1 Atk. 98; *Ex parte* Cobham, 1 Bro. Ch. 576; *Ex parte* Heyden, 1 Cooke, B. L. 254; *Ex parte* Chevalier, 1 Mont. & A. 345.

(*d*) *Ex parte* Hunter, 1 Atk. 223, per Lord Harkwicke; *Ex parte* Blake, Cooke B. L. 503.

(*e*) *Ex parte* Reeve, 9 Ves. 588; *Ex parte* Lodge & Fendal, 1 id. 166; *Ex parte* King, 1 Rose, 212. In *Ex parte* Reeve, Lord Eldon, in holding that, under a joint commission of bankruptcy, the right of the creditors to interest subsequent to the date of the commission, in the case of a surplus, is preferred to a debt from the separate to the joint estate; upon the principle, that neither the partnership nor the individual debtor can claim in competition with the creditors, said:

to the firm, the joint creditors cannot, on that account, prove against his several fund, provided the balance or debt against the partner arose from lawful transactions; but it seems that, if this balance was caused by a fraudulent or surreptitious withdrawal by the partner of something from the joint fund, this should be restored to that fund, for the benefit of the joint creditors. So, if the joint estate is larger at the time of bankruptcy, by any fraudulent act against one partner, his several creditors may, it is said, proceed against the joint estate, for that amount. (*f*)

If there be dormant partners, creditors who dealt in partnership business with the ostensible partners, without any knowledge of the dormant partners, may, upon discovery, elect whether to proceed against the ostensible partners alone, or against the joint fund of the actual partnership. (*g*) But

"All these cases were very fully discussed by Lord Thurlow, in the case of Lodge & Fendal. Mr. Fendal was a creditor of the partnership, of himself and Lodge, for large sums advanced. They became bankrupts immediately after the formation of the partnership; and those advances formed the joint estate, to be divided. There was a struggle by Fendal to be admitted a creditor for the amount of his advances as against the partnership. Lord Thurlow, after full consideration, was of opinion, that all the authorities establish this; that those who, being in partnership, are themselves, or some of them, debtors to the creditors of every class, cannot come in competition with the creditors. After their demands are liquidated finally, the partners may be creditors upon each other, but not before." M'Cauly *v.* M'Farlane, 2 Desaus. 239; *Ex parte* Burrell, Cooke B. L. 503; *Ex parte* Parker, id.; *Ex parte* Pine, id.; *Ex parte* Adams, 1 Rose, 305; *Ex parte* Harris, id. 438; *Ex parte* Sillitoe, 1 Glyn & J. 382; *Ex parte* Ogle, Mont. 350; *Ex parte* Yonge, 3 Ves. & B. 34, 2 Rose, 44; *Ex parte* Batson, Cooke B. L. 503; *Ex parte* Grill, id.

(*f*) *Ex parte* Smith, 1 Glyn & J. 74, 6 Madd. 2; *Ex parte* Cust, Cooke B. L. 506; *Ex parte* Harris, 2 Ves. & B. 214, 1 Rose, 129, 437; *Ex parte* Watkins, 1 Mont. & McA. 57; *Ex parte* Yonge, 3 Ves. & B. 31, 2 Rose, 40; *Ex parte* Reid, id. 84.

(*g*) *Ex parte* Reid, 2 Rose, 84; *Ex parte* Norfolk, 19 Ves. 458; *Ex parte* Watson, id. 459; *Ex parte* Hamper, 17 id. 403; Binford *v.* Dormnett, 4 id. 434; *Ex parte* Matthews, 3 Ves. & B. 125; *Ex parte* Hodgkinson, Cooper, 101. As to the conflicting rights of joint and separate creditors, in cases of partnerships having a dormant partner, see French *v.* Chase, 6 Greenl. 166; Lord *v.* Baldwin, 6 Pick. 348; Cammack *v.* Johnson, 1 Green Ch. 164; Witter *v.* Richards, 10 Conn. 37. It is in the option of a firm, suing as plaintiffs, either to join the dormant partner in the suit or omit him; as, in the corresponding case of the firm being sued as defendants, it is at the option of the plaintiff to join the dormant partner or not; and the joinder or nonjoinder will not constitute any objection to the maintenance of the suit. Skinner *v.* Stocks, 4 B. & Ald. 437; Lloyd *v.* Archbowle, 2 Taunt. 324; Brassington *v.* Ault, 2 Bing. 177; Wilson *v.* Wallace, 8 S. & R. 55; Clarkson *v.* Carter, 3 Cowen, 85;

* 501 it would seem that the rule in *equity, above referred to, that one who may choose between two funds shall not, by such choice, injure one who has no choice, here comes in; and that, if such creditors elect to prove against the separate estate of the ostensible partners, several creditors of the ostensible partners, who could not proceed against the joint fund, may now proceed against it for an equivalent amount. (*h*)

We have before considered the case of parties who are actually partners, but do not appear as such. If, however, they do not seem to constitute two distinct firms, but do so actually, — as, for example, if, out of four who are partners for one kind of business, two are partners in another entirely distinct business, and these two firms deal with each other, — there may be proof by one against the other, or by the creditors of either against its own fund, in the same way as if the two firms were formed of different persons. (*i*)

Boardman *v.* Keeler, 2 Vt. 65; Lord *v.* Baldwin, 6 Pick. 348; Alexander *v.* Barker, 2 Cromp. & J. 133; Cothay *v.* Fennell, 10 B. & C. 671.

(*h*) B. & S. were in partnership together; the latter being a dormant partner. A joint commission issued against them. B.'s separate estate was very considerable; the joint creditors, therefore, availing themselves of their right to resort either to the visible and the dormant partner, or to the visible partner only, adopted the latter alternative, and proved their debt against B.'s separate estate. The consequence of this was, that B.'s separate estate, which would have sufficed for the payment of all the separate creditors in full, was, by the access of the joint creditors, apportioned in a dividend of seven shillings in the pound; while the joint estate of B. & S., exonerated of its proper claimants, produced a surplus. On application of B.'s separate creditors, it was *held*, that they had a lien upon that surplus to the extent which their funds had been diminished by the resort of the joint creditors. *Ex parte* Reid, 2 Rose, 84.

(*i*) *In re* Richardson, 5 L. J. Ch. 129; *Ex parte* St. Barbe, 11 Ves. 413; *Ex parte* Sillitoe, 1 Glyn & J. 374; *Ex parte* King, Cooke B. L. 534; *Ex parte* Johns, id.; *Ex parte* Hesham, 1 Rose, 146; *Ex parte* Adams, id. 305. *In re* Shakeshaft, Stirrup, & Salisbury, cited in 6 Ves. 123, 747, and in 11 id. 413. In this last case, Lord Eldon said: "In the case of Shakeshaft, Stirrup, & Salisbury, Lord Thurlow went upon this distinction: that where there is only one partnership arranging different concerns belonging to them all, in different ways, for the benefit of different parts of that joint concern, as, in that instance, the three persons carrying on the business of cotton manufactures in Lancashire, and two of them in London, there could not be proof by the three against the two; but if the trades be perfectly distinct, then the three as cotton manufacturers in Lancashire might be creditors upon the separate concern of the two as ironmongers in London." *Ex parte* Freeman, Cooke B. L. 534; *Ex parte* Castell, 2 Glyn & J. 124; *Ex parte* Brenchley, id. 127; *Ex parte* Stroud, id.; *Ex parte* Cook, Mont. 228. For the limitations on this doctrine, see *Ex parte* Hargreaves, 1 Cox, 440.

*While solvent partners cannot prove against the joint fund to the prejudice of joint creditors, because they are liable to those creditors, (*j*) they may prove against the joint fund, in competition with the several creditors, to whom they are not liable. (*k*) Indeed, their rights are prior to those of the several creditors; for those creditors can have the right of their debtor to the joint fund only after all claims upon it are satisfied, and, among these, the claims of the other partners. On this point, it must be the general rule, applicable to all partnerships, whether they be general, or confined to a particular business or a particular transaction, and, indeed, to all joint adventures and enterprises of every kind, that they must be first settled, and the mutual claims and balances of the copartners or coadventurers be adjusted, before the divisible surplus is ascertained; and then the right of each one is only to his share of this surplus, and the creditors of each one can reach and acquire only his right. It follows, therefore, that the several creditors of each one will be postponed, so far as the joint assets go, not only to the joint creditors, but to the claims of the coadventurers for balances due from their companions, arising out of the adventure. (*l*) *502

(*j*) *Ex parte* Adams, 1 Rose, 305. A. lends a sum of money to one partner, on his own security, who lends the same to the partnership trade. A joint commission is taken out. A. shall not come in as a creditor upon the joint estate of the bankrupts directly, with the rest of the partnership creditors; but, by way of circuity, he is entitled, as standing in the place of that partner who has paid the money to the use of the partnership trade. *Ex parte* Hunter, 1 Atk. 223. And see *Ex parte* Ellis, 2 Glyn & J. 312; *Ex parte* Carter, id. 233; *Ex parte* Reeve, 9 Ves. 589; *Ex parte* Ogle, Mont. 351; *Ex parte* Burrell, Cooke B. L. 505; *Ex parte* Broome, 1 Rose, 69; *Ex parte* Rawson, Jac. 277; *Ex parte* Robinson, 4 Deac. & Ch. 499.

(*k*) *Ex parte* Adams, 1 Rose, 305; *Ex parte* King, 17 Ves. 115; *Ex parte* Torrell, Buck, 345; Goss *v.* Dufresnoy, Davies B. L. 371; *Ex parte* Hunter, 1 Atk. 225; *Ex parte* Batson, 2 Ca. Ch. 139, 166; Craven *v.* Knight, 2 Chan. 226; *Ex parte* Taylor, 2 Rose, 175; *Ex parte* Ogilvy, id. 177, 3 Ves. & B. 133; *Ex parte* Watson, 4 Madd. 477, Buck, 449, 492; *Ex parte* Willock, 2 Rose, 392; Wood *v.* Dodgson, 2 Maule & S. 195; Aflalo *v.* Fourdrinier, 6 Bing. 309; Butcher *v.* Forman, 6 Hill (N. Y.), 583.

(*l*) West *v.* Skip. 1 Ves. 142; *Ex parte* Ruffin, 6 id. 119 (Sumner's ed.) note (*a*). Upon a dissolution of the partnership, each partner has a lien upon the partnership effects, as well for his indemnity as for his proportion of the surplus. But creditors have no lien upon the partnership effects for their debts. Their equity is the equity of the partnership assenting to the payment of the partnership debts. 3 Kent Comm. (5th ed.) 65; Campbell *v.* Mullett, 2 Swanst. 608, 610; *Ex parte* Harris, 1 Madd. 583; Murray *v.* Mur-

*503 * If any such adventures, contracts, or enterprises are outstanding at the time of the bankruptcy, the assignees must wait until they are concluded and adjusted, and then take the share or interest of their bankrupt in the result. (*m*) The assignees are also entitled to claim unpaid instalments due from a solvent partner, for his admission into the partnership, because these form a part of the joint fund. (*n*)

Nor is the interest of partners in a foreign enterprise lost by seizure of the goods there, provided they, or any part of them, be restored. Thus, if there be three partners, — two citizens of one country, and one of another, — and between these countries war breaks out, and property of the partnership is seized in the country of the one as property of aliens, but the share therein of that one is restored to him, the other partners are entitled, on settlement, to a share of the property re-

*504 stored, in the same way as * if it were restored to the partnership; and, if insolvent, their assignees take that share. (*o*) A foreign government may, however, make a gift to

ray, 5 Johns. Ch. 60; Woddrop *v.* Ward, 3 Desaus. 203; Bell *v.* Newman, 5 Serg. & R. 78; Doner *v.* Stauffer, 1 Penn. 198; White *v.* Union Ins. Co., 1 Nott & McC. 557; Ridgeley *v.* Carey, 4 Harr. & McH. 167; M'Culloch *v.* Dashiell, 1 Harr. & G. 96; Hoxie *v.* Carr, 1 Sumn. 181; Conwell *v.* Sandidge, 8 Dana, 278; *Ex parte* Williams, 11 Ves. 5; Holderness *v.* Shackels, 8 B. & C. 612; Hodges *v.* Holman, 1 Dana, 53; Pierce *v.* Tiernan, 10 Gill & J. 253; Sumner *v.* Hampson, 8 Ohio, 328; Bradford *v.* Kimberley, 3 Johns. Ch. 431; Parker *v.* Muggridge, 2 Story, 347; Payne *v.* Matthews, 6 Paige, 19. The lien of partners upon the whole funds of the partnership, for the balance finally due to them respectively, seems incapable of being enforced in any other manner than by a court of equity, through the instrumentality of a sale. The creditors of the partnership have a preference to have their debts paid out of the partnership funds before the private creditors of either of the partners. But this preference is, at law, generally disregarded; in equity, it is worked out through the equity of the partners over the whole funds. 1 Story Eq. Jur. § 675; Commercial Bank *v.* Wilkins, 9 Greenl. 28; Freeman *v.* Stewart, 41 Miss. 138.

(*m*) French *v.* Fenn, 1 Cooke B. L. 536, 3 Doug. 257; Jackson *v.* Sedgwick, 1 Swanst. 468; Brown *v.* Litton, 1 P. Wms. 140; Smith *v.* De Silva, Cowp. 469. The assignees under a separate commission take only such undivided interest or share as the bankrupt himself had, and in the same manner as he held it. Holderness *v.* Shackels, 8 B. & C. 618. See also Wilson *v.* Greenwood, 1 Swanst. 471, 481, n.; Hammond *v.* Douglas, 5 Ves. 539; Crawshay *v.* Collins, 15 id. 218; Hill *v.* Burnham, cited id.; Brown *v.* Vider, 15 id. 223, 2 Russ. 340; Brown *v.* De Tastet, Jac. 284; Fearns *v.* Young, 9 Ves. 549; Wedderburn *v.* Wedderburn, 4 Mylne & C. 53.

(*n*) Akhurst *v.* Jackson, 1 Swanst. 85, 1 Wilson, 47.

(*o*) Thompson *v.* Ryan, cited in Campbell *v.* Mullett, 2 Swanst. 565, n., and id. 577. And see, as to the effect of war upon partnership, Griswold *v.* Waddington, 16 Johns. 438, and authorities there cited.

their own citizen; and it has been said, that if the government choose to make, or cause to be made, a compensation in money to their citizen, instead of a restitution *in solido*, this will be held to be a gift, in which the copartners have no interest. And this would be especially true if there were an express exclusion of the aliens. Of course, the joint creditors could not prove against funds thus made several. (*p*)

The English Court of Admiralty has refused to assist the assignees of a bankrupt in obtaining his share of property restored *in solido*. But we think this arose from a limitation of the admiralty power in England, which does not exist here. (*q*)

(*p*) Campbell *v.* Mullett, 2 Swanst. 551. Two American citizens residing at Baltimore, and a French subject residing at St. Domingo, being in partnership, and owners of certain ships captured by British cruisers, and the commissioners appointed under the seventh article of the treaty of commerce, concluded in 1794, between England and America, for awarding compensations to American subjects who had suffered losses by capture, for which they could obtain no redress in the ordinary tribunals, having awarded, in compensation of the ships of the partnership captured, certain sums to the two Americans, with express exclusion of the French citizen as an alien enemy, the sums so awarded are not partnership property, and the creditors of the partnership have no claim on them, as against the separate creditors of the Americans. In this case, the following distinction is made by Sir Thomas Plumer, Master of the Rolls, in delivering judgment: "If the very joint stock, or a part of it, as in Thompson *v.* Ryan, had been restored, there would have been nothing to alter the property: the goods are returned, *in statu quo*, the property of the partners. But here the ships are gone, and never restored, and the question concerns a new property come to the two in the way of compensation. That is far removed from a case of restitution. Restitution might have been made, if it were still joint property; compensation considers only the individual shares, and gives in the proportion of their interests individually to the two. There is no more ground for admitting the joint creditors than the French partner." During the argument, the Master of the Rolls put the query, "If a partnership sustained an accidental loss, as by fire, and an individual made a donation to two of the partners, in compensation of their loss, would that be partnership property?" And see Larazzabel *v.* Gorbea, cited id. 572.

(*q*) The Jefferson, 1 C. Rob. Adm. 325. Sir W. Scott, indeed, in his judgment, expressly says, after the decree for restitution had been passed: "The question is, whether the court shall proceed again to make a severance between these parties? I cannot think that I have the power to do that. All the severance that was necessary in this case to determine the national character of the parties has been already made: restitution stands decreed to this house. I am *functus officio*, and I shall not begin again at the prayer of the assignees, who now suggest that one of the partners is likewise an English merchant and a bankrupt. They must resort to some other authority to make the discrimination between this American partnership stock, for the purpose of subjecting a particular share to a British bankruptcy. It is

*505 * It has been repeatedly said, that, if a partner becomes insolvent, the accounts of a firm should be closed, and the assignees should not continue the trade and business, nor permit a continuance of it without settlement. (*r*) But that may not be a positive and universal rule; nor can the solvent partners resist a bill by the assignees for a share in the profits of a subsequent trading, on the ground that the assignees did not require an immediate settlement, because it is no more the duty of the assignees to require this than it is the duty of the solvent partners to make it. (*s*) Where a deceased partner's estate was insolvent, and the administrators had permitted the surviving partners to sell the stock in the usual course of trade for the business benefit, and a loss occurred, they were not held responsible therefor. (*t*) But, on the other hand, if administrators put assets, which they have in their own hands, into the hands and possession of the surviving partners to trade with, and a loss occurs, for this they will be held responsible. (*u*)

no part of the duty of the Court of Admiralty to do this, and I dismiss the petition." See 2 Pars. Mar. Law, b. 3, on the law and jurisdiction of admiralty in America.

(*r*) Crawshay *v.* Collins, 15 Ves. 218–227; Regden *v.* Pierce, 6 Madd. 353; Fereday *v.* Wightwick, 1 Tamlyn, 261; 3 Kent Comm. 64; 2 Bell Comm. 632; Story on Part. § 350; Gow on Part. 234; Collyer on Part. b. 2, ch. 2, § 2, pp. 146, 147.

(*s*) Crawshay *v.* Collins, 15 Ves. 228, per Lord Eldon: "It is said a duty was imposed upon the assignees to call for the account. That is true. It is farther urged that they could not be traders in new adventures. This also is, in a sense, true; but the proposition would be rash, that there can be no case in which they could trade with consent of the creditors, or of the creditors and the bankrupt together. If they had the consent of all persons interested, I do not know that other persons with whom they might deal could make the objection. The duty is not as between them and the other persons, who are not properly to be termed remaining or surviving partners; the destruction of one being, unless it is otherwise provided, a dissolution of the whole partnership, — as if by effluxion of time, or by death, — except as it may be reasoned upon the effect in bankruptcy of the substitution of assignees. It is, however, no more the duty of the assignees to settle with the others, than it is their duty to settle with the assignees."

(*t*) Thompson *v.* Brown, 4 Johns. Ch. 619. And see Shepherd *v.* Towgood, Turner & R. 379; Reed *v.* Norris, 2 Mylne & C. 361; Jennison *v.* Hapgood, 7 Pick. 1; Sweet *v.* Jacocks, 6 Paige, 355.

(*u*) Thompson *v.* Brown, 4 Johns. Ch. 619. And see Barker *v.* Parker, 1 T. R. 295; *Ex parte* Garland, 10 Ves. 119; *Ex parte* Richardson, Buck, 209; Wightman *v.* Townroe, 1 Maule & S. 412; Viner *v.* Cadell, 3 Esp. 90.

SECTION V.

OF A SALE OF THE EFFECTS IN BANKRUPTCY.

*If there be a bankruptcy of the whole firm, it is *506 very seldom that any other mode of settlement is resorted to, but a sale of the property. (*v*) And this is so usual, and recommended by so many obvious considerations, that assignees must not only have an unquestionable power to take this course, but would, perhaps, find it difficult to explain and justify any other course. (*w*) In one case, where creditors called upon the English court of chancery to restrain the assignees from a proposed sale of the bankrupt's effects, alleging suspicious circumstances as to the manner of the sale, Lord Eldon refused to interfere, on the ground that the assignees were acting in a matter peculiarly within their power and at their discretion, and the court must recognize them as the best judges of the propriety and expediency and manner of a sale; and that the assignees must abide their own responsibility for what they did in this matter. (*x*)

The question comes up in a different form when a part only of the partners are bankrupt, and the residue solvent. There the assignees take all the interest and rights of the bankrupt, but take them subject to the solvent partner's rights. (*y*) We should say, therefore, that they had no right, as a matter of course, to require a sale. (*z*) Usually, there is no sale; but the solvent partners settle up the concern so far as to ascertain the value of the bankrupt's interest, and this they pay to the assignees. And sometimes they give security to the assignees that they

(*v*) Eden B. L. 215; *Ex parte* Gering, 1 Ves. Jr. 168; *Ex parte* Hughes, 6 Ves. 617, 622; Regden *v.* Pierce, 6 Madd. 353; Fereday *v.* Wightwick, 1 Tamlyn, 261.

(*w*) But if, in the exercise of a sound discretion, a court of equity is satisfied that a postponement of a sale is for the general benefit of the creditors, it will be so ordered. *Ex parte* Kendall, 17 Ves. 519; *Ex parte* Grosvenor, 14 id. 589.

(*x*) *Ex parte* Montgomery, 1 Glyn & J. 341. Ordinarily, on a dissolution, from whatever cause, there must be a sale. Dickinson *v.* Dickinson, 29 Conn. 601.

(*y*) Taylor *v.* Fields, 4 Ves. 396, 15 id. 559, n.; Barker *v.* Goodair, 11 id. 85; Dutton *v.* Morrison, 17 id. 209; Holderness *v.* Shackels, 8 B. & C. 618.

(*z*) Allen *v.* Kilbre, 4 Madd. 464; *Ex parte* Figes, 1 Glyn & J. 122. But see *Ex parte* Montgomery, id. 338.

will, without delay, settle the concern, and ascertain and pay over the bankrupt's share. (*a*) That the assignees may
*507 have an account, is certain; * and the court would always decree a sale where the assignees requested it for good cause, and perhaps it may be said that any decided advantage to the estate of the bankrupt would be deemed good and sufficient cause. (*b*)

(*a*) In Nerot *v.* Burnand, 2 Russ. 56, pending an appeal against a decree declaring a partnership dissolved and directing the property to be sold, and an account, the court upon motion suspended the sale upon the terms of bringing title-deeds into the master's office, and giving security for the value of the effects.

(*b*) Crawshay *v.* Maule, 15 Ves. 218; Gow on Part. 234; Lingen *v.* Simpson, 1 Sim. & Stuart, 600; Featherstonhaugh *v.* Fenwick, 17 Ves. 309; Fereday *v.* Wightwick, 1 Tamlyn, 261; Regden *v.* Pierce, 6 Madd. 353; Cook *v.* Collingridge, 1 Jacob, 607; Evans *v.* Evans, 9 Paige, 178.

CHAPTER XVI.

OF AN ACCOUNT.

SECTION I.

WHEN AN ACCOUNT WILL BE ORDERED.

We have been obliged to anticipate many remarks about the taking of an account, when treating other topics; especially the various modes of dissolution, and its consequences. The right to demand an account is almost, but not quite, peculiar to partners and their representatives. In deciding one case, (*a*) Lord Eldon seemed to think that the having a right to an account was a good test of the relation of partner; that is, if one by agreement acquires a right to an account, this will make him a partner. We should prefer saying that partnership is a good test for the right to an account; and that the first inquiry must be, whether a man is a partner; for though one may have a right to an account who is not a partner, (*aa*) if he is a partner, the con-

(*a*) *Ex parte* Hamper, 17 Ves. 412. And see Katsch *v.* Shenck, 13 Jur. 668. By a memorandum in writing, the defendant, a general merchant, agreed with the plaintiff, in consideration of the general services in business of the latter, to allow him, in addition to a fixed salary, one-fifth of the net profits on all new business entered into through him: *semble*, a partnership was thereby constituted between the parties; and *held*, that, at any rate, the plaintiff thereby acquired a right, as against the defendant, to an account of profits, and the appointment of a receiver. The Vice-Chancellor: "It strikes me, that by the agreement the plaintiff has become a partner; and there is a failure of evidence to show that, notwithstanding the words of the agreement, there was subjoined any stipulation that the plaintiff should not be taken as a partner; without further entering into the question, as between the plaintiff and defendant, there is an interest created in the plaintiff to know what is the amount of profits, and therefore an interest to see that those things out of which the profits arise are properly disposed of, which is, in itself, very like a partnership interest. I think, on principle, a receiver ought to be appointed." See Salter *v.* Ham, 31 N. Y. 321; Collyer *v.* Collyer, 38 Penn. 257.

(*aa*) [One compensated by a share of the profits may have an account, though not a partner. The right to an account is not a conclusive test of partnership. *Ante*, p. * 66, note (*fff*).]

clusion follows, that he has a right to an account. This right he may transfer; for not only do all partners possess this right, but it is one among those rights which originates in or arises out of a partnership, and yet which a partner transfers
*509 to *his representatives, whether they be executors or administrators, assignees in bankruptcy, execution creditors, or transferees, although they do not thereby become partners. Every one of these, and every other party who has acquired the partner's interest in the joint fund, may call for an account, in order to settle and determine what that interest is. (*b*)

It is partly as a consequence of this universal and important right, that all partners, having any charge of the business of the firm, are bound to keep constantly, regular, intelligible, and accurate accounts of all the business, and to give all the partners at all times access to them, and to the means of verifying them. And if they, for any considerable time, disregard and

(*b*) In Crawshay *v.* Collins, 2 Russ. 342, Lord Eldon says: "A partnership may expire by death, or by effluxion of time, or by notice, or by the bankruptcy of a partner; but, in all these cases, though, in a certain sense of the word *expiration*, a partnership does so expire in each and every one of them, yet, in most instances, a partnership does not and cannot then expire as to all purposes. In some, it may not expire for years after the period in which, in one sense of the word, we say it does expire; and it must depend upon the nature of the partnership, in what way it is to be carried on during the period in which it is to be wound up. If it expires by bankruptcy, there are introduced into it, as persons interested in the manner of winding it up, the assignees of the bankrupt. If it expires by death, there are introduced, in like manner, the executors of the deceased partner; who may be stated, though certainly not in a very correct use of the term, to be a sort of assignees of the deceased partner. When it expires by notice, it may happen that in many cases the party who gave the notice may die long before the time arrives when it may be said to be quite dissolved, and his executors may become partners in the concern. In short, in every species of dissolution which may take place, in different events persons in the course of time may be introduced into the partnership, with reference to whom accounts must be settled much in the same manner as it would have been necessary to have settled them with the original partners." See Bailey *v.* Moore, 25 Ill. 347. See, as to what interest gives a right to an account, Moffat *v.* Moffat, 10 Bosw. 468. [Even a member of a firm organized for the purpose of hindering and delaying creditors of a prior firm may have an account. Harvey *v.* Varney, 98 Miss. 118.

Where after dissolution the respective partners continue in settlement of the affairs of the partnership, the statute of limitation begins to run against the right of either to an account from the others, from the date of the last transaction, receipt, or payment by either, and no demand is necessary before suit. McClung *v.* Capehart, Sup. Ct. Minn., 1 N. W. Reptr. 123.]

refuse to perform this duty, a court of equity will coerce them to its full discharge. (*c*)

* It is possible that for a breach of this duty, especially * 510 where there was an express contract to perform it, an injured party might have redress at law; but he can compel the performance, and, generally, find a remedy for the ill consequence of a non-performance, only in equity. But this court has full power in the premises, and usually acknowledges the right to an account of any partner, or representatives of a partner, unless it is obviously unnecessary, and requested for frivolous reasons, or with malicious intent. (*d*)

(*c*) Rowe *v.* Wood, 2 Jac. & W. 358, per Lord Eldon: "One partner cannot exclude another from an equal management of the concern; and it is the duty of each to keep precise accounts, and to have them always ready for inspection, and, in short, to keep good faith towards each other. I think that the plaintiff, subject to the equities which may be ultimately declared between the parties, has a clear right to insist that regular accounts shall be kept of all receipts, payments, transactions, and so on, relative to the mine, and to have constant access for the purpose of inspecting the accounts; and also, that, subject to those equities, he has a clear right to control the working of the mines, and if he is impeded in the exercise of any of these rights, let him come to the court again. The application, after the other parties have been apprised of what the court expects them to do, will be differently treated." Beacham *v.* Eckford, 2 Sandf. Ch. 116. See Tyng *v.* Thayer, 8 Allen, 391.

(*d*) Smith's Merc. Law (5th ed.), 35; Marshall *v.* Colman, 2 Jac. & W. 266. Where plaintiff has an adequate remedy at law by action of account, it is *held*, in Connecticut, that chancery has no jurisdiction. Stannard *v.* Whittlesey, 9 Conn. 556. It has also been *held* in Connecticut, that no action at law will lie for the settlement of a partnership account, where the number of partners exceeds two; the remedy is in equity. Beach *v.* Hotchkiss, 2 Conn. 425. But it is otherwise in Pennsylvania. Whelen *v.* Watmough, 15 Serg. & R. 153; Griffith *v.* Wilbing, 3 Binn. 317; Brightly Eq. Jur. §§ 121, 122, 123; Adams Eq. 225; 1 Story Eq. § 449. And see Bracken *v.* Kennedy, 3 Scam. 558; Gillett *v.* Hall, 13 Conn. 426; Cunningham *v.* Littlefield, 1 Edwards Ch. 104. Partners cannot sue one another at law for any of the business or undertakings of the partnership. This can only be done in chancery, by asking a dissolution and an account. Stone *v.* Fouse, 3 Cal. 294; Nugent *v.* Locke, 4 id. 320; Wilson *v.* Lassen, 5 id. 116; Barnstead *v.* Empire Min. Co., id. 299. On the action of account at law, see 3 Steph. Bl. 532; Foster *v.* Allanson, 2 T. R. 479; Jackson *v.* Stopherd, 4 Tyrw. 330; Elgie *v.* Webster, 5 M. & W. 518; Brown *v.* Tapscott, 6 id. 119. It has been *held*, that partners may sue each other at law for a breach of any distinct engagement in the partnership agreement, and that generally adequate relief can in such case be obtained. Where this can be done, equity will not interfere. Kinloch *v.* Hamlin, 2 Hill Ch. 19; Duncan *v.* Lyon, 3 Johns. Ch. 360; Hunt *v.* Gookin, 6 Vt. 462. [But where two persons enter into a partnership as to certain proposed contracts, and, after the completion of one, one partner notifies the other that as to the other contracts he shall proceed on his sole

* 511 * Whenever there is a dissolution of a partnership, for any cause, it would seem that there must be an account, if it be demanded by any party in interest. (*e*) But it is always possible for partners or their representatives to agree together upon some arrangements which render an account unnecessary. Nor is this very unfrequent in fact. The parties interested value the property, good-will, &c., and found their arrangements upon this estimate; one paying to the other a sum of money, without any account being taken. (*f*) But such

account, the remedy is by suit for a breach of the contract, and not by a bill to account for profits. Doyle *v.* Bailey, 75 Ill. 418.] See Cross *v.* Cheshire, 7 Exch. 43. Where there is a distinct promise to pay an ascertained sum, as where a balance of accounts is struck, assumpsit will lie between partners. Hall *v.* Stewart, 12 Penn. 213; Hamilton *v.* Hamilton, 18 id. 20. See Morrow *v.* Riley, 15 Ala. 710; Gridley *v.* Dole, 4 Comst. 486; Miller *v.* Andress, 13 Ga. 366. And where an account stated resulting in such balance is retained by a partner without objection, a promise will be implied, as in other cases. Van Amringe *v.* Ellmaker, 4 Penn. 281. But in matters of difficulty or controversy between partners, it is now most usual to resort to a court of equity for their final adjudication and settlement. Bracken *v.* Kennedy, 3 Scam. 558. It will entertain jurisdiction, although account or other action would lie between the parties. Gillett *v.* Hall, 13 Conn. 426; Cunningham *v.* Littlefield, 1 Edw. Ch. 104. And although one partner cannot bind the firm by deed, Donaldson *v.* Kendall, 2 Ga. Decis. 227; Napier *v.* Catron, 2 Humph. 534; Dickinson *v.* Legare, 1 Desaus. 537; Skinner *v.* Dayton, 19 Johns. 513; Fisher *v.* Tucker, 1 McCord Ch. 170; Williams *v.* Hodgson, 1 Harris & J. 474; yet, in some cases, a court of equity will regard a debt secured by the specialty of one partner as a simple contract debt, and hold all the partners bound by it. See Galt *v.* Calland, 7 Leigh, 594; McNaughten *v.* Partridge, 11 Ohio, 123; Christian *v.* Ellis, 1 Gratt. 396; Anderson *v.* Tompkins, 1 Brock. 456; Kyle *v.* Roberts, 6 Leigh, 495; James *v.* Bostwick, Wright, 142. As to pleadings and practice in taking an account, see Auld *v.* Butcher, 2 Kan. 135.

(*e*) Adams Eq. ch. 3, p. 239, et seq.; Collyer on Part. (3d Am. ed.) § 298; 1 Story Eq. Jur. § 671; Forman *v.* Hanfray, 2 Ves. & B. 329; Harrison *v.* Armitage, 4 Madd. 143; Russell *v.* Loscombe, 4 Sim. 8; Knowles *v.* Haughton, 11 Ves. 168; Waters *v.* Taylor, 15 id. 15; *Ex parte* Broadbent, 1 Mont. & A. 635. See Hayes *v.* Reese, 34 Barb. 151; Vermillion *v.* Bailey, 27 Ill. 230; Pope *v.* Salsman, 35 Mo. 362. [A partner may have an account, although he has failed to pay in the capital he agreed to contribute. Palmer *v.* Tyler, 15 Minn. 106. But see Stevenson *v.* Mathers, 67 Ill. 123. An account will not be decreed, if it appears that the party praying for it has no real cause of complaint, and that no good purpose can be served by directing an account to be taken. McKacy *v.* Hebb, 42 Md. 227. Nor when one partner has received, by agreement with his copartners, all he could in any event be entitled to, so that he has no interest in the accounts. Wagner *v.* Wagner, 50 Cal. 76.]

(*f*) 7 Jarman Convey. 31; Cookson *v.* Cookson, 8 Sim. 529. But see Cook *v.* Collingridge, Jac. 607, 620. [Where one partner sells out his interest to another, the presumption is that

an arrangement can arise only from an agreement; for if the parties differ as to the value of the property, or of their respective interests therein, an account must be taken, as the only means of determining this. (*g*) Indeed, the taking of an account is a frequent preliminary to any * further * 512 action by a court of equity; because by this means alone can the court ascertain the true relation of the parties as to their rights and obligations. (*h*) An account and a dissolution seem to be so clearly connected, that Lord Eldon, as we have seen, was unwilling to grant an account, unless the petitioner prayed also for a dissolution: (*i*) but this cannot be

the price paid is based upon a settlement of accounts. Wiggin *v.* Goodwin, 63 Me. 389; Noonan *v.* Huddleston, 64 Ill. 11.]

(*g*) Featherstonhaugh *v.* Fenwick, 17 Ves. 298, 309, per Sir William Grant: "The next consideration is, whether the terms upon which the defendants proposed to adjust the partnership concern were those to which the plaintiff was bound to accede. The proposition was, that a value should be set upon the partnership stock; and that they should take his proportion of it at that valuation, or that he should take away his share of the property from the premises. My opinion is clearly, that these are not terms to which he was bound to accede. They had no more right to turn him out than he had to turn them out, upon those terms. Their rights were precisely equal: to have the whole concern wound up by a sale, and a division of the produce. As, therefore, they never proposed to him any terms which he was bound to accept, the consequence is, that, continuing to trade with his stock, and at his risk, they come under a liability for whatever might be produced by that stock. In the case of Crawshay *v.* Collins, 15 Ves. 218, there was no circumstance, except, merely, that there had been no adjustment of accounts with the assignees of the bankrupt. Here, the defendants proposed adjusting the accounts on certain terms, but terms which the other party was not bound to accept. Though he, thinking they had no right to dissolve the partnership, might not have gone into any detail of the principles on which the dissolution should take place, yet I conceive it to have been their duty, in the first place, to put themselves right by offering to him those terms upon which the law gave him a right to insist; and, not having done so, but continuing to trade with his stock under the liability to answer for the profits, the same inquiry should be directed as in Crawshay *v.* Collins, to ascertain what that stock was at the period of the dissolution, what use was afterwards made of it, and what profits were produced by the trade." Wilson *v.* Greenwood, 1 Swanst. 471, 482; Rigden *v.* Pierce, 6 Madd. 353; Cook *v.* Collingridge, Jac. 607.

(*h*) It has often been *held* that there can be no division of partnership property until all the accounts of the partnership have been taken, and the clear interest of each partner ascertained; that the chancellor may, in a proper case, dissolve the partnership, but cannot aid in carrying it on. Baird *v.* Baird, 1 Dev. & B. 524; McRae *v.* McKenzie, 2 id. 232; Camblat *v.* Tupery, 2 La. Ann. 10; Kennedy *v.* Kennedy, 3 Dana, 240. But see Hudson *v.* Barrett, 1 Pars. Sel. Eq. Cas. 414.

(*i*) Forman *v.* Hanfray, 2 Ves. & B. 329.

deemed a rule of equity, (*j*) although in the great majority of cases, where the relations between the partners are such that one of them can obtain an account only through the interposition of a court, a dissolution is and should be asked. (*k*)

SECTION II.

OF OPENING AN ACCOUNT FOR ERROR.

* 513 * Mere errors alone will not always lead to the opening and restating of accounts. If the parties agree, as they sometimes do, that closed accounts shall not be opened for error, after the death of the parties, or after a fixed period, a

(*j*) In Harrison *v.* Armitage, 4 Madd. 143, it is said that the rule laid down by Lord Eldon applies only to the case of an injunction, or to a case of interim management. The following cases bear on the question; Loscombe *v.* Russell, 4 Sim. 8; Knowles *v.* Haughton, 11 Ves. 168; Waters *v.* Taylor, 15 id. 15; Walworth *v.* Holt, 4 Mylne & C. 619, 635. In this last case, Lord Cottenham made a very full review of the authorities; deciding that a relief of this limited kind could be given without a prayer for dissolution, and a final winding up of the affairs of the company. This rule, although not without great conflict, seems now to be decided. Richardson *v.* Hastings, 7 Beav. 301; Fairthorne *v.* Weston, 3 Hare, 387; Miles *v.* Thomas, 9 Sim. 609; Goodman *v.* Whitcomb, 1 Jac. & W. 593; Richards *v.* Davies, 2 Russ. & M. 347; Richardson *v.* Hastings, cited in 3 Hare, 391; Chapple *v.* Cadell, Jac. 537.

(*k*) Loscombe *v.* Russell, 4 Sim. 8; Waters *v.* Taylor, 15 Ves. 10; Forman *v.* Hanfray, 2 Ves. & B. 329; Goodman *v.* Whitcomb, 1 Jac. & W. 589; Chapman *v.* Beach, id. 594; Marshall *v.* Colman, 2 id. 266; Vansandau *v.* Moore, 1 Russ. 441; Pigott *v.* Bagley, McClel. & Y. 569; Krebell *v.* White, 2 Younge & C. 15. In an action by one partner for a dissolution of the partnership, and an account, &c., alleging that dividends of profits were to be made at stated periods, the court may decree the payment of the sum due for such dividends, before final distribution of the assets. O'Conner *v.* Stark, 2 Cal. 155. The ordinary course is to pray that the partnership may be dissolved, and the surplus assets distributed; but this practice has been relaxed in favor of joint-stock companies, and of other numerous partnerships, and bills have been sustained which asked more limited relief; namely, that the assets of an abandoned or insolvent partnership might be collected and applied in discharge of the debts, leaving the questions of dissolution and contribution as between the partners entirely open for future settlement. Adams Eq. 241; Goodman *v.* Whitcomb, 1 Jac. & W. 572; Marshall *v.* Colman, 2 id. 266; Glassington *v.* Thwaites, 1 Sim. & Stuart, 124; Loscombe *v.* Russell, 4 Sim. 8; Walworth *v.* Holt, 4 Mylne & C. 619; Richardson *v.* Hastings, 7 Beav. 301, 323; Apperly *v.* Page, 1 Phillips, 779; Fairthorne *v.* Weston, 3 Hare, 387.

A creditor cannot file a bill to stop a partnership, and wind up its concerns. It is only at the instance of a partner that this can be done. Clement *v.* Foster, 3 Iredell Eq. 213.

court of equity will always respect such an agreement, (*l*) unless gross mistake, fraud, or great danger of fraud, be shown. (*m*) And the same reasons which cause * partners to make such an agreement would induce a court to open an account only for important error, after the death of parties or long acquiescence. (*n*) But it has been held, that

* 514

(*l*) Gainsborough *v.* Stork, Barnard. 312. See Heath *v.* Corning, 3 Paige, 566; Stoughton *v.* Lynch, 2 Johns. Ch. 218. In Mackellar *v.* Wallace, 26 Eng. L. & Eq. 62, 8 Moore P. C. Cas. 378, the following distinction is drawn: "Parties having accounts between them may meet and agree to settle those accounts by the ascertainment of the exact balance; it may be necessary for that case, and probably it is necessary in most cases, that vouchers should be produced, and that all the information possessed on one side and the other should be furnished in the settlement of that account; and, if it afterwards turn out that there were errors in that account, it is a sufficient ground for opening such account, and setting it right in a court of equity. If, on the other hand, persons meet and agree, not to ascertain the exact balance, but a sum which one is willing to pay, and the other is content to receive as the result of those accounts, — in a case of that sort, it is obvious that the production of vouchers is entirely unnecessary, and errors in the account are entirely out of the question; for the very object of the parties is to avoid the necessity for producing those vouchers, upon the assumption that there are or may be errors in the account so settled. Therefore, it is either an account stated and settled, in the formal sense of the expression, or it is the case of a settlement by compromise."

(*m*) Oldaker *v.* Lavender, 7 Sim. 239. In Mackellar *v.* Wallace, cited *supra*, the court, after laying down the doctrine as above, go on to say: "In either case, the transaction might be vitiated by fraud. In either case, it is good for nothing if, either from the collusion of the parties, or from the circumstances under which the settlement takes place, it is proved in a court of equity that the transaction was not so fairly and so fully understood between the parties, either from the confusion in which it was involved, or from misrepresentation made on the one side or the other, as it ought to have been, and that injustice has been done on either side." Slee *v.* Bloom, 20 Johns. 669, 5 Johns. Ch. 366; Lee's Admr. *v.* Reed, 4 Dana, 112; Botifeur *v.* Weyman, 1 McCord Ch. 156; Barrow *v.* Rhinelander, 1 Johns. Ch. 550; Johnson's Executors *v.* Ketchum, 3 Green Ch. 364; Bloodgood *v.* Zeily, 2 Cai. Cas. 124; Gray *v.* Washington, Cooke, 321; Chappedelaine *v.* Dechenaux, 4 Cranch S. C. 309; Stoughton *v.* Lynch, 2 Johns. Ch. 218, 219, 1 Madd. Ch. Pr. (2d ed.) 103, 262, 280; Herrick *v.* Ames, 8 Bosworth, 115; Cann *v.* Cann, 1 P. Wms. 727; Stapilton *v.* Stapilton, 1 Atk. 10; Pullen *v.* Ready, 2 Atk. 592; Lewis *v.* Pead, 1 Ves. Jr. 19; Vernon *v.* Vawdry, 2 Atk. 119, 2 Eq. Cas. Abr. 8; Gordon *v.* Gordon, 3 Swanst. 476; Halhed *v.* Marke, id. 444, note, 1 Hovenden on Frauds, 160; Osmond *v.* Fitzroy, 3 P. Wms. 130; Willis *v.* Jernegan, 2 Atk. 251; Milnes *v.* Cowley, 8 Price, 620; Lloyd *v.* Passingham, Cooper, 156; Beaumont *v.* Bramley, 1 Turner, 51; Evans *v.* Bicknell, 6 Ves. 183, 189; [Pomeroy *v.* Benton, 57 Mo. 531.]

(*n*) A suit to impeach an account ought to be brought within a reasonable time, or, at farthest, within the statutory period for commencing an action at law, upon matters of account. Lupton *v.* Janney, 13 Pet. 381. And where the bar of the statute is inapplicable, — namely, where the demand is purely equitable, — the court is reluctant to interfere after a considerable

where a partnership had existed for eight years, and during this time accounts had been taken, without cancellation of books, releases, or discharges in full, an account might be called for. (*nn*) Where there is danger of fraud, or where the accounts were made up by parties having unrestricted power, and acting under strong personal interest, as in the case of accounts between an executor partner and the legatees of the deceased partner, a long acquiescence will not establish them beyond the reach of inquiry; (*o*) and in one case, else-

lapse of time; particularly after the death of parties whose transactions are involved in the inquiry. Adams Eq. 227; Baker *v.* Biddle, Baldwin C. C. 418; Ellison *v.* Moffat, 1 Johns. Ch. 46; Ray *v.* Bogart, 2 Johns. Cas. 432; Rayner *v.* Pearsall, 3 Johns. Ch. 578, 586; Mooers *v.* White, 6 id. 360, 370; Bolling *v.* Bolling, 5 Munf. 334; Randolph *v.* Randolph, 2 Call, 537, id. (2d ed.) 453; Dexter *v.* Arnold, 2 Sumner, 108; Wilde *v.* Jenkins, 4 Paige, 481; Dakin *v.* Demming, 6 Paige, 95; Bloodgood *v.* Zeily, 2 Cai. Cas. 124; Gregory's Ex'rs *v.* Forrester, 1 McCord Ch. 318, 382; Ex'rs of Radcliffe *v.* Wightman, id. 408; Hutchins *v.* Hope, 7 Gill, 119; Chesson *v.* Chesson, 8 Ired. Eq. 141. But, where there has been fraud, the court will open and examine accounts after any length of time, even though the person who committed the fraud be dead. Botifeur *v.* Weyman, 1 McCord Ch. 156. But it must be shown that the fraud was not, and could not with reasonable diligence be, discovered, until within six years before the commencement of suit. Ogden *v.* Astor, 4 Sandf. S. C. 311.

(*nn*) Lynch *v.* Bitting, 6 Jones Eq. 238. And see Stephens *v.* Orman, 10 Fla. 9.

(*o*) A., B., & C., in 1796, became partners, as merchants, under articles for seven years, and it was provided, that, if either party died in the mean time, the partnership should be determined, as to his share, from the first of May following his death; and that thereupon an account should be taken, and, after payment of debts, "payment, appropriation, and delivery" should be made, between the surviving partners and the executors of the deceased partner, of the residue of the moneys, goods, &c., of the partnership. In 1801, B. died, and appointed his wife and surviving partners, A. and C., his executors and guardians of his infant children, who were his residuary legatees. A. and C., only, proved the will, and having caused a valuation and account of the partnership assets to be made, a balance sheet was settled up to the first of May, 1801, showing what amount was due to the testator's estate (which included outstanding credits to a large amount), and his estate was credited accordingly in the partnership books, and the partnership continued by the surviving partners, but no severance of the assets was made. In May, 1809, the eldest son came of age, and an account was stated, by the executors, of the testator's residuary personal estate, but which assumed, as its basis, the valuation and account made on the testator's death. Another account was stated of the debts and credits remaining unpaid and uncollected, showing what was then divisible; and another of the moneys expended for the eldest son's maintenance. A deed, dated September, 1809, between A. and the eldest son, was executed, on which these accounts were indorsed, and A. covenanted for the payment, by instalments, of the share due to

where * referred to, they were opened after some thirty * 515 years of acquiescence. (*p*) Where fraud had been committed, an account was opened after nearly as long a time, although the fraudulent partner had long been dead. (*q*) And if the bill praying for the opening of a settled account do not

the eldest son, so far as the same had been realized; and the eldest son declared he was "content and satisfied with the disclosures thus far made and accounts thus far given," &c.; and it was provided that he should not be prevented from claiming any further share "not as yet received, or fallen in, or accounted for." In 1810, 1815, 1821, 1826, and 1830, changes took place in the partnership firm. There were three younger children, who attained twenty-one, respectively, in 1812, 1813, and 1820, when similar accounts, founded on the same basis, were stated in each of them by the executors; and a similar deed of settlement executed by the two former, and a release by the latter, and further divisions of the testator's assets made accordingly. In 1816, the only other child died an infant, and then also a division of assets was made; and, in 1822, a deed of release was executed by the trustees of the settlement of one of the daughters, in respect of a balance not included in the deed executed by her. The bill was filed in 1831, by the several children and their representatives. *Held*, that A. and C., being executors and guardians as well as surviving partners, and the release being partial only, and founded on insufficient knowledge by the *cestuis que trust* of the partnership affairs and accounts, the plaintiffs were not precluded, by their deeds or by lapse of time, from inquiring into the mode in which the assets of the old firm had been dealt with, and claiming a share in the profits arising from the testator's assets having been used in the business of the successive partnerships. Wedderburn *v.* Wedderburn, 2 Keen, 722, 4 Mylne & C. 41. And see Cook *v.* Collingridge, 1 Jac. 607; Walker *v.* Symonds, 3 Swanst. 64–69; Gregory *v.* Gregory, Cooper, 201, Jac. 631; Champion *v.* Rigby, 1 Russ. & M. 539; Chalmers *v.* Bradley, 1 Jac. & W. 51; Downs *v.* Gazebrooke, 3 Meriv. 200; *Ex parte* Lacey, 6 Ves. 628; Cockerell *v.* Cholmeley, 1 Russ. & M. 425, on the strictness of equity in similar cases of trust. See also Smith *v.* Clay, 3 Bro. C. C. 639, note; Townsend *v.* Townsend, 1 Cox, 28; Bonney *v.* Ridgard, id. 145; Beckford *v.* Wade, 17 Ves. 87, 97; Hickes *v.* Cook, 4 Dow, 16, on the question of the length of time that had elapsed. Dickenson *v.* Lord Holland, 2 Beav. 310; Purcell *v.* Cole, 1 Longf. & T. 449; Edwards *v.* Meyrick, 2 Hare, 60, 6 Jur. 924.

(*p*) Wedderburn *v.* Wedderburn, 2 Keen, 722, 4 Mylne & C. 41. And see Hoe *v.* Richards, 2 Beav. 305. Under particular circumstances of fraud, imposition, and delay, a court of equity will decree an account of rents and profits of an estate after an adverse possession of fifty years. Stackpole *v.* Davoren, 1 Bro. P. C. 9. And, in another case, where an entry in an administrator's account, which had been settled, was shown to be fraudulently made, the whole account was opened, notwithstanding the lapse of forty years since the death of the intestate, seventeen since the settlement of the account, and more than two since the discovery of the entry complained of. Special directions were inserted in a decree for the protection of the accounting party. Allfrey *v.* Allfrey, 1 Macn. & G. 87, 1 Hall & Twells, 179, 13 Jur. 269.

(*q*) Vernon *v.* Vawdry, 2 Atk. 119; Botifeur *v.* Weyman, 1 McCord Ch. 161; Lowe *v.* Farlie, 2 Madd. Ch. 102; Beames' Pleas in Eq. 232.

allege fraud, but, in the opinion of the court, the facts stated imply fraud, the prayer will be granted. (*r*)

* 516 * A party seeking to open an account for error must specify the errors so particularly that each may be judged of by itself. For the court may be unwilling to open an account if, when it is opened, it may be examined and unravelled from end to end. (*s*) But they may be willing to permit the plaintiff to surcharge and falsify. (*t*) If an omission has

(*r*) Farnham *v.* Brooks, 9 Pick. 212. And see Wormley *v.* Wormley, 8 Wheat. 421; Fullagar *v.* Clark, 18 Ves. 481. Courts of equity feel themselves at liberty to infer, judicially, a fraudulent purpose, from suspicious circumstances, well corroborated and in no way rebutted, though such circumstances fall short of legal proof. Earl of Chesterfield *v.* Janssen, 2 Ves. Sen. 155; Walker *v.* Symonds, 9 Swanst. 71; Taylor *v.* Jones, 2 Atk. 602; Stileman *v.* Ashdown, id. 480. A party who has once admitted an account to be correct cannot afterwards file a bill to have the account taken in equity, upon the mere allegation that he had no means of ascertaining that the account so delivered was correct, without charging specific acts of fraud against the defendant; and it is not necessarily an allegation of fraud to say that the accounting party agreed to deliver up certain chattels demanded by the other, upon condition of having his alleged balance admitted and paid. Darthery *v.* Lee, 2 Younge & C. 5, 5 L. J. N. S. Exch. Eq. 73; President, &c., of Orphan Board *v.* Van Reenen, 1 Knapp, 100.

(*s*) Union Bank *v.* Knapp, 3 Pick. 113; Kinsman *v.* Barker, 14 Ves. 579; Shepherd *v.* Morris, 4 Beav. 252; Chambers *v.* Goldwin, 9 Ves. 254; Calvit *v.* Markham, 3 How. (Miss.) 343; Mebane *v.* Mebane, 1 Ired. Eq. 403; De Montmorency *v.* Devereux, 1 Drury & Walsh, 119; Leaycraft *v.* Dempsey, 15 Wend. 83; Baker *v.* Biddle, 1 Bald. 394, 418; Bainbridge *v.* Wilcocks, id. 536, 540; Consequa *v.* Fanning, 3 Johns. Ch. 587, 17 Johns. 511, 1 Madd. Ch. Pr. (4th Am. ed.) 103; Taylor *v.* Hamlin, 2 Bro. C. C. 310; Wide *v.* Jenkins, 4 Paige, 481; Weed *v.* Small, 7 id. 573; Hobart *v.* Andrews, 21 Pick. 526; Chappedelaine *v.* Dechenaux, 4 Cranch, 306; Bullock *v.* Boyd, 2 Edw. Ch. 293; Philips *v.* Belden, id. 1; Stoughton *v.* Lynch, 2 Johns. Ch. 209; Hickson *v.* Aylward, 3 Moll. 1. Where an account stated is open a long time, as sixteen years, after it has been rendered, it will not generally be opened. It will be opened as to fraud or mistakes charged in the bill, and so far proved that the court is satisfied they ought to be corrected; and, when some such errors are proved, then as to other errors charged, which the court is satisfied ought to be made the subjects of further examination. Ogden *v.* Astor, 4 Sandf. S. C. 311. And see Clarke *v.* Tipping, 9 Beav. 282; Holland *v.* Holland, 6 Ired. Eq. 407; Pritt *v.* Clay, 6 Beav. 503; Scott *v.* Milne, 5 id. 215, affirmed 12 L. J. N. S. Ch. 233, 7 Jur. 709; Jones *v.* Latimer, 1 id. 980; Johnson *v.* Curtis, 3 Bro. C. C. 226; Taylor *v.* Hayling, 1 Cox, 435; Dunbar *v.* Lane, 1 Bro. P. C. 3; Maund *v.* Allies, 5 Jur. 860; Milliken *v.* Gardner, 37 Penn. 456. The court will not open a settled account where it has been signed, or a security taken on the foot of it, unless the whole transaction appears fraudulent, upon errors specified in the bill, and supported by evidence. Drew *v.* Power, 1 Sch. & Lef. 182. See Parker *v.* Jonté, 15 La. Ann. 290, as to alleged errors in books.

(*t*) Consequa *v.* Fanning, 3 Johns. Ch. 587; Troup *v.* Haight, Hopk. 239;

been made of a credit due, the *plaintiff, by show- *517
ing the same, will be permitted to add it; and this is a surcharge. If a wrong charge is stated in the account, the plaintiff may be permitted to remove it; and this is falsification. (*u*) It may be added, as a general remark, that whenever accounts are stated by persons having great trust reposed in them, and great power, a court of equity allows a latitude in opening and examining such accounts, bearing some proportion to that trust and power. (*v*)

In England, the practice is quite uniform of requiring a partner who petitions for an account, and either admits expressly or by implication that he is, or is shown to be, owing to the partnership a private debt or balance, to pay that debt or balance into court before a decree will issue. (*w*) This is not

Chappedelaine *v.* Dechenaux, 4 Cranch, 306; Redman *v.* Green, 3 Ired. Eq. 54; Bullock *v.* Boyd, 1 Hoff. Ch. 294; Nourse *v.* Prime, 7 Johns. Ch. 69; Philips *v.* Belden, 2 Edw. Ch. 1; Grover *v.* Hall, 3 Har. & J. 43; Freeland *v.* Cocke, 2 Munf. 352; Compton *v.* Greer, 2 Dev. Ch. 93; Miller *v.* Wornack's Adm'rs, Freeman's Miss. Ch. 486; Lilly *v.* Kroesen, 3 Md. Ch. 83; Williams *v.* Savage Manuf. Co., 1 id. 306; Kinsman *v.* Barker, 14 Ves. 579; Vernon *v.* Vawdry, 2 Atk. 119, Barn. Ch. 280, 305; Sewel *v.* Bridge, 1 Ves. Sen. 297; Earl Pomfret *v.* Lord Windsor, 2 id. 482; Pit *v.* Cholmondeley, id. 565; Brownel *v.* Brownel, 2 Bro. Ch. 62; Chambers *v.* Goldwin, 9 Ves. 254; Anon., 2 Eq. Abr. 12. Plaintiff, in his bill, having assigned 150 errors in five stated accounts, an order was made on him to pick out those he would insist on, and, if the court should be of opinion they were not errors, to consent to waive the rest. If the court thought them errors, there would be good cause either to decree an open account, or give plaintiff leave to surcharge and falsify. Rodney *v.* Hare, Mos. 296. See further, on the question of surcharging and falsifying, Roberts *v.* Kuffin, 2 Atk. 112; Chambers *v.* Goldwin, 5 Ves. 837; *Ex parte* Townshend, 2 Moll. 242; Hickson *v.* Aylward, 3 id. 14; Davies *v.* Spurling, 1 Tamlyn, 199, 1 Russ. & M. 64; Millar *v.* Craig, 6 Beav. 433. The party complaining of errors in a settled account should make the errors appear by proof. Bry *v.* Cook, 15 La. Ann. 493.

(*u*) In reference to these terms, see 1 Story Eq. Jur. § 525; Pitt *v.* Cholmondeley, 2 Ves. Sen. 565, 566; Perkins *v.* Hart, 11 Wheat. 237, 256.

(*v*) Matthews *v.* Wallyn, 4 Ves. 118; Newman *v.* Payne, 2 Ves. Jr. 199; Pit *v.* Cholmondeley, 2 Ves. Sen. 565; Stoughton *v.* Lynch, 2 Johns. Ch. 217; Higginson *v.* Fabre, 3 Desaus. 93. Thus, in ordinary cases, the rule is, that the establishment of a material mistake is necessary to induce the court to give a decree entitling the party to surcharge and falsify an account. But, where the relation of attorney and client subsists, the ordinary rule does not prevail; for there, though the party only alleges generally that the accounts, as settled, are erroneous, the court will, if sufficient cause be shown, make a decree opening those accounts. Lawless *v.* Mansfield, 1 Drury & War. 557, 4 Ired. Eq. 113.

(*w*) Vin. Abr. Partners (E), 5; Melioruchi *v.* Royal Ex. Ass. Co., 1 Eq. Abr. 8; Gold *v.* Canham, 2 Swanst. 325, 1 Ch. Ca. 311. See Mulhollan *v.* Eaton, 11 Curry (La.), 291. Payment

true of a debt on partnership account; for if a partner avers that he has taken money from the firm, but avers also that
* 518 a balance is still due to him, he * is not required to pay into court the money thus taken, unless special reasons exist for the requirement. (*x*) The rule is, therefore, applicable only to a private and personal debt. It would hardly be applied here, merely on the authority of the English practice; but it rests in that country on the general principle, that he who asks equity must be ready to do equity; and it may be expected that a similar rule will be provided for here, by the rules of practice of the courts of equity. (*y*)

of money into court is directed where the defendant admits money to be in his hands which he does not claim as his own, and in which he admits that the applicant is interested. Adams Eq. 350. See, on this subject, Hosack *v.* Rogers, 9 Paige, 468; Clagett *v.* Hall, 9 Gill & J. 81; Contee *v.* Dawson, 2 Bland, 293; Nokes *v.* Leppings, 2 Phillips, 19; Maddox *v.* Dent, 4 Md. Ch. 543.

(*x*) Foster *v.* Donald, 1 Jac. & W. 252. In this case, the plaintiffs and the defendant carried on business together in the north of England. It had been proposed to dissolve the partnership; and the terms of dissolution had been nearly arranged, when the defendant represented that, before finally acceding to them, he thought it proper to go to London, for the purpose of consulting a friend residing there. In the course of his journey, he went round to several customers of the firm, in different parts of the country, and collected of them debts due to the partnership to the amount of about 2,318*l.* In one instance, a debt due by himself had been set off against a debt due to the firm, and he received the difference. The bill was filed for an account of the partnership transactions. The defendant, in his answer disclosing these facts, stated that he believed the balance of the account would be in his favor. Lord Eldon: "If a partner, as partner, receives money belonging to the firm, and, admitting that he has received it, insists that there is a balance in his favor, there is no pretence for making him pay it in. But if he has received it under circumstances from which you can infer that he had agreed not to receive it, and that his receiving it was contrary to good faith, then he may be ordered to bring it into court. Cases may happen where 10,000*l.* may be due to him, and yet he may have received 1,000*l.* under such circumstances that he will not be allowed to retain it. . . . Though it is very true that a partner may receive partnership effects, and insist on not paying in the amount, unless all the other partners will pay in what they have in their hands, yet I think the defendant has admitted himself to have received these sums in a manner in which he ought not to have received them. He must, therefore, pay them in." See Richardson *v.* The Bank of England, 4 Mylne & C. 165, in which the question is fully considered. See also Mills *v.* Hanson, 8 Ves. 68, 91; Domville *v.* Solly, 2 Russ. 372; Toulmin *v.* Copland, 3 Younge & C. 643. In Jervis *v.* White, 6 Ves. 738, the defendant was ordered to pay money into court before answer in a case of gross fraud, appearing upon affidavit by the plaintiff, and by a corresponding affidavit by the defendant. Daniel's Ch. Pr. (Perkins' ed.) 2024; Vann *v.* Barnett, 2 Bro. C. C. 158; Costeker *v.* Horrox, 3 Younge & C. 530.

(*y*) Under section 244 of the New York Code of Procedure, as amended

SECTION III.

HOW AN ACCOUNT SHOULD BE TAKEN.

*As to the manner of taking an account, the first remark to be made is, that the parties themselves may regulate this, and the court will respect their agreement. (z) This may be contained in the original articles, or in subsequent agreements. Or it may be derived from their practice. Where partners have, for a considerable time, settled their accounts in a certain way and upon certain terms, it is obviously reasonable to infer that this was their agreement and understanding. Equity will draw this inference, and direct the account to be taken in a similar manner. (a) Indeed, this evidence from custom, or from conduct and acquiescence, is even stronger than that of expressed agreement. For if there be certain terms agreed upon, and the accounts have been kept in disregard of them for a considerable time, and without objection, we have seen that the court will treat it as a waiver of the terms by the party whom they benefit, or as a subsequent agreement cancelling them. (b) And the accounts need not *519

in July, 1851, a partner, who by his answer admits that he has in his hands partnership funds, which on his statement appear to belong to the administrators of his deceased partner, will be ordered to pay over such funds to them, although there are outstanding contested claims against the firm, and it has claims to enforce which will require time and disbursements. The order for such payment will, however, require the administrators to give security to the surviving partner to contribute to the outstanding claims, if established, and to pay their share of the expenses that may be incurred in prosecuting the demands of the firm. The surviving partner will also be permitted to retain sufficient to cover such claims against the deceased partner as are contested in the suit in which the order is made. 4 Sandf. 642. If a defendant by his answer acknowledges any particular sum due, though he swears those sums were discharged, yet it is still a ground for directing an account. Brace *v.* Taylor, 2 Atk. 253.

(*z*) See *ante*, p. *302, note (*z*).

(*a*) Jackson *v.* Sedgwick, 1 Swanst. 460, 469, per Lord Eldon: "Partnership accounts may be taken in various ways. The distinction is, that, in the absence of a special agreement, the accounts must be taken in the usual way; but where a special agreement has been made, it must be abided by, provided that the parties have acted on it; if not, I always understood that the articles are read in this court as not containing the clauses on which the parties have not acted."

(*b*) Geddes *v.* Wallace, 2 Bligh, 270; Petty *v.* Janeson, 6 Madd. 146; Const *v.* Harris, Turn. & Russ. 496, 523; Jackson *v.* Sedgwick, 1 Swanst. 460, 469.

be signed by the parties, if there be other evidence of acquiescence. The possession of the account and vouchers for a long time, without objection, will be deemed evidence of acquiescence; not only from its intrinsic probability, but because the other parties have a right to know and meet, at an early period, any objections which exist, or else to go on upon the
* 520 assumption that none exist. (*c*) Hence, in * a leading American case, it was *held*, that a partner would be deemed to acquiesce in any statement of account to which he did not object within a reasonable time. (*d*)

(*c*) Willis *v.* Jernegan, 2 Atk. 251. The plaintiff's counsel objected to the defendant's plea of a stated account, on the ground that it was not signed by the parties. Lord Hardwicke: "There is no absolute necessity that it should be signed by the parties who have mutual dealings, to make it a stated account; for even where there are transactions supposed between a merchant in England and a merchent beyond sea, and an account is transmitted here from the person who is abroad, it is not the signing which will make it a stated account, but the person to whom it is sent, keeping it by him any length of time, without making any objection which shall bind him, and prevent his entering into an open account afterwards." Id. 252. Tickel *v.* Short, 2 Ves. Sen. 239; Morris *v.* Harrison, Colles P. C. 157; 1 Story, Eq. Jur. § 526; 2 Dan. Ch. Pr. 762; Jessup *v.* Cook, 1 Halst. 436; Lamalere *v.* Caze, 1 Wash. C. C. 436, 2 P. A. Browne, 128; Murray *v.* Toland, 3 Johns. Ch. 569; Wilde *v.* Jenkins, 4 Paige, 481; Freeland *v.* Heron, 7 Cranch, 147; Codman *v.* Rodgers, 10 Pick. 112. But in Clancarty *v.* Latouche, 1 Ball & B. 428, it was *held*, by Lord Chancellor Manners, that acquiescence alone, in accounts furnished, does not amount to a settlement, although it must have considerable effect. This, however, was in reference to an account which was usurious; and which, even if expressly concurred in, would have been set aside. Where an account relied on as a stated account has not been signed, it is not enough to prove the delivery of it. The acquiescence of the other party in it must also be proved. Irving *v.* Young, 1 L. J. Ch. 108. In the Attorney-General *v.* Brooksbank, 2 Younge & J. 42, the chief baron of the exchequer expressed an opinion that an account stated must be actually signed by the parties, to enable the defendant to plead it in bar to a suit for an account; although he seemed to suppose an account not signed might be a good defence, if set up in the answer and proved at the hearing. Commenting on this, Chancellor Walworth says: "That opinion is clearly not law; and it is directly opposed to that of Lord Hardwicke, in Willis *v.* Jernegan, 2 Atk. 252, where he says, in express terms, that it is not necessary that the account should be signed by the parties." Heartt *v.* Corning, 3 Paige, 566.

(*d*) Heartt *v.* Corning, 3 Paige, 566. And see 1 Story, Eq. Jur. § 526; Com. Dig. Ch. 2 A. 3; Lamalere *v.* Caze, 1 Wash. C. C. 436; Killam *v.* Preston, 4 Watts & S. 14. In Lamalere *v.* Caze, the court says: "To constitute a settled account, all the parties must consent to it; all must be bound by it, or none are. This consent must be either expressed or implied. I am inclined to think, that if, after dissolution, one partner were to state the account, and send it to the other, who should by his conduct show his acquiescence, by retaining it for a considerable time, without objections, that he might be

*But the terms of an account, whether proved ex- *521
pressly or by implication, are not conclusive. Even if the articles, or subsequent agreements, or practice with acquiescence, or all together, would lead to the conclusion that certain terms had been agreed upon, still, if fraud, oppression, or uncompensated and extreme injury, can be shown, the court will direct the account to be stated upon premises more consistent with justice. (*e*) It may be said, in general, that whenever on a dissolution questions arise among the partners as to the division of the property or profits, these questions fall within the jurisdiction and practice of equity. (*ee*)

If a decree for an account issues, and the case is referred to a master to take an account, his method of proceeding will be governed very much by the rules and custom of his own court. In general, the parties must produce before him all books, vouchers, and evidence, bearing upon the general account or any special items; and he may examine not only witnesses, but all the parties, and should examine any party at the suggestion or desire of any opposite party, unless this be obviously and certainly unreasonable. (*f*)

bound by that statement, as well as the other, and that this action for the balance might then be maintained." But in Killam *v.* Preston, Kennedy, J., delivering the opinion of the court, and deciding that a partnership account stated by one partner after the dissolution, and presented to the other, who retains it in his possession for more than a year without objecting to it, is not sufficient evidence, upon which a recovery of the balance appearing to be due upon it may be had, said: "It would seem, from the weight of authority, that there must not only be a final settlement and balance struck, but an express promise to pay; otherwise the action cannot be maintained. Foster *v.* Allanson, 2 T. R. 479; Fromont *v.* Coupland, 2 Bing. 170, 9 Eng. Com. Law, 367. The only authority to the contrary that I am aware of is a *nisi prius* decision of Gibbs, C. J., in Rackstraw *v.* Imber, Holt, N. P. Cas. 368, 3 Eng. Com. Law, 132, where he says he considers an implied undertaking sufficient." And see Irving *v.* Young, 1 Sim. & Stuart, 333. And see further, on this question, Attwater *v.* Fowler, 1 Edw. 417; Story Eq. Pl. § 801; Cooper Eq. Pl. 278, 279; Moravia *v.* Levy, 2 T. R. 483, note; Casey *v.* Brush, 2 Caines, 296; Ozeas *v.* Johnson, 1 Binn. 191, and cases in previous note.

(*e*) Oldaker *v.* Lavender, 7 Sim. 239; Story on Part. § 206; Collyer on Part. (Perkins' ed.) b. 2, ch. 2, § 225.

(*ee*) See, for cases in which the English court of chancery took jurisdiction of such questions, Wood *v.* Scoles, Law Rep. 1 Ch. 369; Ibbotsam *v.* Elam, Law Rep. 1 Eq. 188; Homfray *v.* Fothergill, Law Rep. 1 Eq. 567.

(*f*) Ferry *v.* Henry, 4 Pick. 75; Glyn *v.* Caulfield, 6 Eng. L. & Eq. 1, 15 Jur. 807; Toulmin *v.* Copland, 3 Younge & C. 655; Beckford *v.* Wildman, 16 Ves 438. In one case, where a surviving partner, who had possession of the partnership books, wilfully

* 522 * Generally, the master should begin from the last account which was closed and settled, taking the balance thereof as his basis; unless, by order of court, or for reasons shown, he goes behind this account. If there be no settled account, he must supply the want of one, by beginning with the

and fraudulently refused to produce them, to have the accounts taken under a decree for that purpose, the master, in the absence of other evidence, charged ten per cent per annum on the capital stock, as the net gains made during the partnership, and debited the surviving partner with a moiety thereof. The court *held* that the master was justified in so doing, and made a decree accordingly. Walmsley *v.* Walmsley, 3 Jones & La T. 556. And in another case, where the defendant denied charges in the bill of fraud and misconduct, and explained others away, alleging his inability to put in a full answer, by reason that plaintiff withheld improperly the partnership books, the court refused (but without prejudice to future application) the injunction prayed by the bill. Littlewood *v.* Caldwell, 11 Price, 97. In 1811, A. & B. entered into a partnership, which continued till 1818, when it was dissolved, and the affairs wound up, except as to some outstanding debts. In 1820, a deed of release was executed, from which these debts were excluded. Partnership books relating generally to these and other debts were all along suffered to remain in A.'s hands. All the outstanding debts were subsequently settled. In 1830, B. was declared bankrupt, till which time the books were never called for by B. *Held*, that A. & B., nevertheless, continued tenants in common in respect of them, and that the length of time did not affect that relationship; and, therefore, although there was no charge of fraud in the settled account, yet the commissioner had jurisdiction to call A. before him, and examine him and the books relative to the former dealings of the bankrupt. *Ex parte* Trueman, 1 Deac. & Ch. 464; *Ex parte* Levett, 1 Glyn & J. 185. So, the solicitor of the purchaser of an estate from a bankrupt has been ordered to attend (but without prejudice to privilege) for the purpose of being examined. *Ex parte* Hodgson, 2 Glyn & J. 21. But where a partnership has expired by efflux of time, and, in a suit for account, &c., a receiver has been appointed before decree, the court will not compel defendant (the former managing partner) to deliver up to receiver, for the purpose of making out bills of costs, partnership books and accounts which have remained in his hands, and title-deeds belonging to a third person, which came into the possession of the copartners as solicitors; such defendant offering the receiver free access thereto, and to assist in making out such bills. Dacie *v.* John, McClel. 206, 13 Price, 446. Partnership accounts having been directed to be taken by the masters in a case in which some of the books have been lost, the court directed the master, if it should appear in taking the account that any necessary books, &c., should be wanting, to report the same specially, and whether in consequence of the want of such books he was unable to proceed satisfactorily in taking the account. Millar *v.* Craig, 6 Beav. 433. See further, in reference to accounts in partnership books, Heartt *v.* Corning, 3 Paige, 566; Caldwell *v.* Leiber, 7 id. 483; Simms *v.* Kirtley, 1 T. B. Monroe, 80; Stoughton *v.* Lynch, 2 Johns. Ch. 217, 218; Allen *v.* Coit, 6 Hill (N. Y.), 318; Withers *v.* Withers, 8 Peters, 359; United States Bank *v.* Binney, 5 Mason, 188; Phillips *v.* Turner, 2 Dev. & B. Eq. 123; Fletcher *v.* Pollard, 2 Hen. & Munf. 544; Brickhouse *v.* Hunter, 4 id. 363; Kyle *v.* Kyle, 1 Gratt. 526; Hallett *v.* Hallett, 2 Paige, 432.

partnership, and stating the account according to ordinary rules and usage, unless they are controlled by some agreement of the parties, or some peculiar circumstances, which he will be careful to report. (*g*) And he must *continue the account to the day on which he makes it, unless there has been a previous dissolution. In that case, he will continue it to the dissolution, and either stop there, or from that day begin a new account; for the dissolution has terminated the partnership, and the account thereafter is not an account between partners. (*h*) And if there be outstanding items to be

*523

(*g*) Beak *v.* Beak, Cas. temp. Finch, 190. In this very early case on the question, a bill was brought to have an account of the estate of Elias Beak, deceased, and of a stock of money by him brought into trade with the defendant, Arnold Beak, his brother, in the year 1648. The bill set forth that in April, 1662, a balance was made; that from the year 1648 a joint trade was carried on between the brothers, till February, 1673; that several balances were made in loose papers, and "a particular balance in February, 1673," when all the particulars were agreed between them, excepting only an error of a small amount. It appears, however, from the further report of the case, that Elias made his will in March, 1667, and soon after died. It was admitted on all sides, that an account ought to be had of the estate in partnership; but the question was about the time it should begin, and how long it should continue. The counsel for the plaintiffs insisted on an account stated in the year 1662, and that it ought to proceed from that time without any retrospect; and that the stock of Elias might not be carried on in a pretended partnership after his death, but that it might be accounted as his separate estate from that time. The counsel for the defendant argued that the account of the joint trade ought to be carried on till all the accounts relating to the partnership could be settled and made even. The court decreed an account, and that if the master should find a balance concerning the joint trade, either in 1662, or in 1673, or at any other time, then he was to take it from such time; otherwise, it must take its rise from the year 1648, when the partnership first began, and must be carried on to the death of Elias, but not afterwards. For the plaintiff ought not to be concluded by any new or growing account in trade, but only is to have an account of what was then in partnership, and the proceeds thereof till got in.

(*h*) Booth *v.* Parks, 1 Molloy, 465, per Sir A. Hart, Lord Chancellor: "There can be no partnership without existing partners. It is not correct to say, that the survivor, carrying on the business for the purpose of winding it up, carries on a partnership-trade: he only deals with the effects finally *ex necessitate*, and rather in the character of a trustee. If he continues it as a trade, it is at his own risk, liable to the option of accounting for profits, or being charged with interest upon the deceased partner's share of the surplus, as taken at his death." In Dyer *v.* Clark, 5 Metc. 575, Shaw, C. J., says: "The time of the dissolution fixes the time at which the account is to be taken, in order to ascertain the relative rights of the partners, and their respective shares in the joint fund. The debts may be numerous, and the funds widely dispersed and difficult of collection; and, therefore, much time may elapse before the affairs can be wound up, the debts paid, and the surplus put in a condition to be divided. But whatever time may elapse before the

settled afterwards, when they are settled they must be referred back to that period. (*i*) The same principles of appropriation of payment which have already been spoken of will be applied to the account; the most general one being that the earliest payment shall be applied to the earliest debt, and the first sum paid in by a customer who deposits and draws is the first sum drawn out. (*j*)

* 524 * In regard to the terms of the account and settlement, and the charges, credits, or allowances to be made, it has been conceded, by the highest authority, that specific rules are of little use, because the justice of every case requires that its peculiar facts and merits, the nature of the trade, the conduct of the parties, and all the various circumstances which affect the rights of the parties, must be taken into consideration in determining what they are or should be. In our note will be found many cases in which special circumstances were considered by English and American courts. (*k*) One rule,

final settlement can be practically made, that settlement, when made, must relate back to the time when the partnership was dissolved, to determine the relative interests of the partners in the funds."

(*i*) Stoughton *v.* Lynch, 2 Johns. Ch. 209; Dyer *v.* Clark, 5 Metc. 575. And see Tyng *v.* Thayer, 8 Allen, 391; Brinley *v.* Kupfer, 6 Pick. 179; Williams *v.* Henshaw, 11 id. 79, 12 id. 378; Dickinson *v.* Granger, 18 id. 315, 317.

(*j*) Clayton's Case, in Devaynes *v.* Noble, 1 Meriv. 572; Bodenham *v.* Purchas, 2 B. & Ald. 39; Pemberton *v.* Oakes, 4 Russ. 154; Toulmin *v.* Copland, 3 Younge & C. 625. In this last case, it was decided that where persons carry on business in the nature of a banking business, — as, for instance, that of navy agents, — and a change takes place in the house by the death or retirement of a partner, on taking the partnership accounts, the rule in Clayton's Case will be held *primâ facie* to apply as well between the partners themselves as between the partners and third persons; and there must be strong evidence to rebut the presumption as to that mode of taking the partnership accounts. Therefore, where A. and B. were partners as navy agents, and A., becoming a lunatic, that partnership was dissolved, and the business was carried on upon the same terms by B. and C., and B. died, and the accounts of both partnerships were unsettled, — *held*, that the accounts of A. and B. must be taken on the foundation of the rule in Clayton's Case, although C., in order to establish an agreement to the contrary, set up certain affidavits made by B., in a suit brought against him by the committee of the lunatic, in which he alluded to an understanding between B. & C. (which, in some instances, had been acted upon), that the advances made to the customers of their firm should be repaid before any portion of the moneys paid in by those customers was applied in liquidation of their debts due to the original firm.

(*k*) Willett *v.* Blanford, 1 Hare, 253, 269, per Sir James Wigram, V. C.: "I have again considered the subject, and read the cases to which I was referred; and I remain of the opinion I expressed at the close of the argument, that there is no rule of this court ap-

already stated, is of so much practical importance, that we repeat it here; it is, that a partner settling the business, as a

plicable alike to all cases; and that there is no rule which is so established or general in its application, that it is to be taken to be the general rule, until circumstances are shown which displace it. The facts of each case must be fully brought under the view of the court, before it can be in a position to state what justice to the party seeking its protection may require, with due regard to the interest of other parties. No one can attend to the elaborate judgments of Lord Eldon in Crawshay *v.* Collins, Brown *v.* De Tastet, and even in Cook *v.* Collingridge, without being satisfied that his mind saw the impossibility of subjecting cases so various as those of trading partnerships to any universal rule. The decrees in these cases, that of Sir William Grant in Featherstonhaugh *v.* Fenwick, and the judgment and decree of Lord Cottenham in Wedderburn *v.* Wedderburn, confirming Lord Langdale's decree in the same case, all concur to establish the soundness of Lord Eldon's opinions; and I think it is impossible to consider the subject, abstractedly from authority, without feeling satisfied that justice would be endangered by an attempt to subject all cases of this description to any uniform rule." [Where one firm enters into copartnership with a third person as a distinct firm, they are all in the new firm as individuals, and the profits must be divided equally amongst all. Warren *v.* Smith, 9 Jur. N. S. 168. If no valuation of the services of the respective partners is agreed upon, none can be made in settling the account, however much they may differ in value. Kaiser *v.* Wilhelm, 2 Mo. Ap. 596. A., the partner of B., having charge of the firm business at a certain place, employs a firm, of which he is also a member, to conduct it on commission. Accounts are rendered to B., who makes no objection. A. also sells goods of one firm to the other firm, with notice to B., and at full market value. B. cannot, after dissolution and settlement, demand an account of A.'s share of the commission; nor is A. to account for profits received by him as partner in the purchasing firm, although said firm takes the goods to fill contracts for delivery at a larger price than they pay for it. Fuch *v.* Blakiston, Sup. Ct. Penn., 15 Alb. L. J. 288. An attorney at law, who is a partner in a commercial firm, cannot charge against his firm commissions for collecting accounts due it. Vanduzer *v.* McMillan, 37 Ga. 299. In making up accounts between partners, presumptions are against those who, by fraud or negligence, embarrass the settlement; and it will be the duty of the master, in such case, to protect the firm. Harvey *v.* Varney, 104 Mass. 436. Where partners are to share equally, and on dissolution, after a losing business, one is found to have contributed more than the other to the capital, the loss must be shared equally, notwithstanding the inequality of contribution. Nowell *v.* Nowell, L. R. 7 Eq. 538. Articles between C., W., B., & S. provided that C. and W. should contribute the whole capital in unequal proportions; that C. should contribute "such terms as he may be able to give;" that W., B., & S. should each contribute all their time to the business; that each partner should receive one-fourth of the net profits; and that C. and W. should receive interest on the capital contributed by them. The business resulted in loss, and the firm was dissolved. It was *held*, that the capital constituted a debt of the firm, to which all the partners were obliged to contribute equally; and that, one of them being insolvent, the loss was to be borne equally by the other three. Whitcomb *v.* Converse, 119 Mass. 38. A., the owner of an established business, agrees with B. that the latter shall receive a certain percentage of the profits, annually, up to $5,000. In accounting, A. cannot charge profit

surviving or remaining partner, is looked upon as a trustee, and the rules of equity devised to secure the faithful discharge of a trust are all of them applicable to him. (*l*) In a case in Louisiana, it is said that the correct rule in taking an account between partners is to ascertain what each has contributed, and first to make them equal, and then divide the balance of the proceeds. (*ll*)

A sale is sometimes decreed as a preliminary proceeding, or a means for making an account; and, in some instances, a

and loss, with interest on capital, or on old business debts, or with B.'s salary. But he may charge depreciation of plant; and, if the business is sold at an advance above the estimated value at the time of the agreement, B. has no right to a percentage on the difference. Rishton *v.* Grissell, L. R. 5 Eq. 326. When a dissolution takes place under such circumstances that one partner, who has paid a bonus, is in fact a loser by failure of consideration, the court will consider this loss as an element of the account. Atwood *v.* Maude, L. R. 3 Ch. 369; MacKenna *v.* Parkes, 36 L. J. 366; Wilson *v.* Johnstone, L. R. 16 Eq. 606. But see Carleton *v.* Cummings, 51 Ind. 478. Where A. and B. enter into a copartnership for the purpose of a commission and warehouse business, A. to furnish the buildings and fixtures, and B. to keep the books and to give his time and talents to the business, B. may, on his own account, procure other houses for storage, if A. refuses, and the firm business is not neglected. And, if in such case the managing partner dies, his estate will be entitled to share in the profits upon storage earned in his lifetime, but not collected till after his death, deducting the actual expenses accruing after the decease. And, if the proceeds of sales are not called for for twelve years, the estate of the deceased partner will be entitled to a decree for his proportion thereof. Parnell *v.* Robinson, Sup. Ct. Ga. 1877, 4 L. & Eq. Reptr. 13. As to interest, see *ante*, p. * 230. When, after a dissolution, the continuing partner carries on the business with the partnership stock pending settlement, he will not be required to account for profits made subsequent to dissolution, if at that time the retiring partner had no interest in, but was in debt to, the firm. Taylor *v.* Hutchinson, 25 Gratt. (Va.) 536. On a bill against surviving partners for an account, they should be charged with the value of the assets as likely to be realized on reasonable diligence in the disposition thereof, and not with their value as of the date of the decease. Moore *v.* Huntington, 17 Wall. (U. S.) 417. The surviving partner may be allowed for expenditure not strictly on partnership account, if made in accordance with the previous practice of the firm, and the business has been continued at request of the deceased partner. Tillotson *v.* Tillotson, 34 Conn. 355.]

(*l*) Cook *v.* Collingridge, Jac. 607, 622, 2 Fonb. Eq. 186; Simpson *v.* Feltz, 1 McCord Ch. 213, 220; Honore *v.* Colmesnil, 7 Dana, 201; Beacham *v.* Eckford's Exec., 2 Sandford's Ch. 116; West *v.* Skip, 2 Ves. Sen. 242. [Where, after dissolution by death, cotton held on commission was sold by the surviving partner, and the proceeds were not claimed within twelve years, it was *held* that the estate of the deceased partner was entitled to its proportion of such unclaimed proceeds. Parnell *v.* Robinson, 4 L. & Eq. Reptr. 13, Sup. Ct. Ga. See also Keye's Appeal, 65 Penn. St. 196.]

(*ll*) Frigerio *v.* Crottes, 20 La. Ann. 351.

sale will be ordered on mere motion. (*m*) We have already adverted to the fact, that a sale is, generally speaking, that method of disposing of the property, or facilitating its division, which is least open * to the danger of fraud or * 525 mistake, and is, therefore, much favored. Perhaps the rule may be stated thus: The presumption is always in favor of a sale; the parties may agree to substitute something else, and the court will sanction such an agreement, unless it is open to obvious and decided objection, as tainted with fraud or oppression, or leading to injustice. (*n*) But no party has a right to insist on taking the property at a valuation, without the consent of the other; nor may he insist as a matter of course upon the division of the property *in specie*, although this would be more favored than the taking at a valuation without consent. (*o*) Still, it must always be possible, that the peculiar circumstances of the case may make a sale injurious, and that the true interests of all parties may be better preserved and protected without it; and then a court is under no obligation to require a sale. (*p*)

(*m*) Crawshay *v.* Maule, 1 Swanst. 523.

(*n*) *Ex parte* Montgomery, 1 Glyn & J. 341; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Fox *v.* Hanbury, Cowp. 445; Crawshay *v.* Collins, 15 Ves. 218; Regden *v.* Pierce, 6 Madd. 353; Fereday *v.* Wightwick, 1 Tamlyn, 261; 3 Kent Comm. 64; 2 Bell Comm. 632, 633; Evans *v.* Evans, 9 Paige, 178; Cook *v.* Collingridge, Jac. 607; Leach *v.* Leach, 18 Pick. 75.

(*o*) Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Cook *v.* Collingridge, Jac. 607; Regden *v.* Pierce, 6 Madd. 353; Sigourney *v.* Munn, 7 Conn. 11; Evans *v.* Evans, 9 Paige, 178; Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 68; Conwell *v.* Sandidge, 8 Dana, 278; Crawshay *v.* Maule, 1 Swanst. 495, 523; Simmons *v.* Leonard, 3 Hare, 581.

(*p*) See cases cited *ante*, in the two preceding notes. [A partner's interest in a trade-mark or brand is too unsubstantial to justify a court in ordering a sale. Taylor *v.* Bemis, 4 Biss. (C. Ct. U. S.) 406.]

CHAPTER XVII.

OF LIMITED PARTNERSHIPS.

FORMERLY the name of limited partnership was given to one formed for a special or particular business or enterprise. (*a*) The meaning of this phrase was not well defined, and it was of no importance in the law. Now, however, in this country, it is applied to a new thing. A limited partnership, in the present sense of the phrase, is one in which one or more of the partners are so in the usual way, in respect to power, property, and obligation; and one or more of them have placed a certain sum in the business, and may lose that, but are not liable further.

The purpose of the law in permitting such a partnership is obvious. It is to encourage and facilitate trade and commerce, and induce capitalists to embark their capital therein, or a certain part of their capital, by relieving them from the peril, hanging over all partnership by the common-law merchant, of losing not only all they have in the trade, but all they have beside. On the continent of Europe, it has long been known, (*b*) and found to be useful and safe. And almost forty years ago it was permitted in the great commercial State of New
* 527 York, by a statute * copied substantially from the French

(*a*) Willett *v.* Chambers, Cowp. 814, 816; 2 Bell Comm., b. 7, ch. 2, p. 261, 5th ed. See also Robey *v.* Howard, 2 Stark. N. P. C. 557. For illustrative cases, see Carrick *v.* Vickery, Doug. 652, n.; Holmes *v.* Higgins, 1 B. & C. 74; Livingston *v.* Roosevelt, 4 Johns. 251; Dubois *v.* Roosevelt, id. 262; Livingston *v.* Hastie, 2 Caines, 246; Lansing *v.* Gaine, 2 Johns. 300; Ensign *v.* Wands, 1 Johns. Cas. 171; Schollenberger *v.* Seldonridge, 49 Penn. 83.

(*b*) Coope *v.* Eyre, 1 H. Bl. 48, per Lord Loughborough: "In many parts of Europe, limited partnerships are admitted, provided they be entered on a register; but the law of England is otherwise, the rule being, that, if a partner shares in advantages, he also shares in all disadvantages." Limited partnerships (*la Société en commandité*) were established in France by the ordinance of 1673, and have been continued and regulated by the new code of commerce. *Répertoire de Jurisprudence par Merlin*, tit. *Société*, art. 2; *Code de Commerce*, b. 1, tit. 3, § 1.

Code of Commerce; this being, says Chancellor Kent, the first instance in the history of the legislation of that State, in which the statute law of any other country than Great Britain has been closely imitated and adopted. (*c*) Not long afterwards, the example was followed by other States; and now there are similar provisions in upwards of twenty States. (*d*)

In England, this salutary law is not yet adopted, excepting as to joint-stock companies. (*e*) But of late years there have been repeated attempts in Parliament to enact a law extending this principle to partnerships generally, some of which were almost successful. They still fear, however, or say they fear, that it relaxes the liability of partners to a dangerous extent, and encourages speculation and reckless enterprise, by taking away or lessening one of its most important checks. On this point, the experience of this country is entitled to much consideration; and an innovation upon mercantile law which has stood the severe test of American practice for a whole generation, and has never been recalled or importantly modified, (*f*) nor found dangerous or injurious to the public, nor seriously objected to in any point of its working, may be regarded as resting upon good authority. (*g*)

(*c*) 3 Kent's Comm. 36, 7th ed.

(*d*) Maine, Massachusetts, Rhode Island, Connecticut, Vermont, New York, New Jersey, Pennsylvania, Maryland, Indiana, Michigan, South Carolina, Georgia, Mississippi, Alabama, Florida, Louisiana, Illinois, Virginia, Kentucky, Delaware, Tennessee, Ohio, and California, and probably in other States, of which the information has not yet reached us. Banking and insurance are excepted in New York, New Jersey, Pennsylvania, Maryland, South Carolina, Alabama, Georgia, Florida, Maine, Massachusetts, Mississippi, Connecticut, Vermont, Rhode Island, Delaware, Tennessee, Ohio, and California.

(*e*) The principle has been applied in England to joint-stock companies; and a great number of statutes have been passed in relation thereto. The most important are the following; viz., 1 Vict. ch. 73; 7 & 8 id. ch. 110; 18 & 19 id. ch. 133; 19 & 20 id. ch. 47; 25 & 26 id. ch. 89. By 21 & 22 id. ch. 91, joint-stock banking companies are allowed to be formed on the principle of limited liability. In the British province of New Brunswick (ch. 121, Rev. Stat. of N. B.), the principle has been adopted for general business, with the usual exceptions of banking and insurance. And also in Nova Scotia, with like exceptions. Rev. Stat. ch. 79, §§ 12–25.

(*f*) Troubat [Limited Partnership, § 39] says: "That the statutes on limited partnership in the various States should be, in substance, identical, is perfectly natural; inasmuch as the common source, the commercial code of France, the work of the jurists of the empire, has been largely borrowed from by them all."

(*g*) "Every one," says an able French writer, "may have an interest in commerce and trade, under such a system, for amounts small or large.

*528 * No one doubts that the general liabilities of partners, however severely they may press upon individuals in some cases, are, on the whole, wise and necessary. And if the limited partnership, which is free from these stringent liabilities, is useful and safe, both for those who engage in it and for the community, it must be from the excellence of that system of precaution by which the community is protected. The general principles of this system are, first, ascertaining the actual placing of the sum proposed within the joint funds, where it may be liable for the joint debts; secondly, giving adequate public notice of the amount, and of the parties, and of the business, so that the public may estimate correctly the credit to be given to the firm, and providing, also, that notice should be given of any important change; thirdly, securing this joint fund from undue diminution, and thus preventing the original notice from being deceptive and injurious. The statutes of no two States are verbally alike; but they all imitate the statute of New York in these essentials, which that statute borrowed from the Code of Commerce of France. (*h*)

The facility, too, of realization has thrown round this form of investment considerable attraction. We have seen large capitals thus drawn, in the promptest and easiest way, into the general industrial and commercial movement; and the adjunction of bailors of funds to responsible general partners constitutes not a union of persons, but an association of capitals analogous to that of incorporated companies. In this manner has it come to pass that limited partnerships have become in reality so many incorporations, wherein the liability of the general partners stands in lieu of the authorization of government. . . . To convey an idea of the immense service rendered by limited partnerships, with capitals divided into shares thus transferable, it will suffice to say that calculations, untinged with exaggeration, carry to above a thousand millions the capital engaged in this form of social business. A few years, too, have sufficed to bring about this truly colossal result, in spite of the cases of gross swindling and signal frauds that have marked the progress of the new combination of interests. But by these frauds it was not creditors who suffered; it was the shareholders, themselves." Wolowsky, *Des Sociétés par Actions*, 7, 9, 13. In reference to the same matter, Watson on Part. 2, citing Pothier on Obligations, says: "Society *in commendam*, &c., was that between two persons, one of whom only put his money into stock, without doing any other office of a copartner; the other, who was called the *complementary* of the society, despatching all the business in his own name. This society was very useful to the State; inasmuch as all kinds of persons, even nobles and professional men, might contract it, and thus make their money of service to the public; and those who had no fortune of their own to trade withal, hereby found means of establishing themselves in the world, and of making their industry and address serviceable."

(*h*) In Ames *v.* Downing, 1 Bradf.

They differ * more or less in the exact provisions by * 529
which these essential precautions are taken; but they

321, 329, the court, in holding that a special partnership, formed under the provisions of the Revised Statutes of New York, is dissolved by the death of the special partner, and that it is, like a general partnership, a personal contract, expiring with the death of any of the parties, make an elaborate examination of the origin, history, and nature of limited partnerships. We quote at some length. "The system of limited partnerships," say the court, "which was introduced by statute into this State, and subsequently very generally adopted in many other States of the Union, was borrowed from the French code. 3 Kent Comm. 36; *Code de Commerce*, 19, 23, 24. Under the name of *la Société en commandité*, it has existed in France from the time of the Middle Ages; mention being made of it in the most ancient commercial records, and in the early mercantile regulations of Marseilles and Montpelier. In the vulgar Latinity of the Middle Ages, it was styled *commenda*, and in Italy *accomenda*. In the statutes of Pisa and Florence, it is recognized as far back as the year 1160; also, in the ordinance of Louis-le-Hutin, of 1315; the statutes of Marseilles, 1253; of Geneva, of 1588. In the Middle Ages, it was one of the most frequent combinations of trade, and was the basis of the active and widely-extended commerce of the opulent maritime cities of Italy. It contributed largely to the support of the great and prosperous trade carried on along the shores of the Mediterranean; was known in Languedoc, Provence, and Lombardy; entered into most of the industrial occupations and pursuits of the age; and even travelled, under the protection of the arms of the Crusaders, to the city of Jerusalem. At a period when capital was in the hands of nobles and clergy, who, from pride of caste, or canonical regulations, could not engage directly in trade, it afforded the means of secretly embarking in commercial enterprises, and reaping the profits of such lucrative pursuits, without personal risk; and thus the vast wealth, which otherwise would have lain dormant in the coffers of the rich, became the foundation, by means of this ingenious idea, of that great commerce which made princes of the merchants, elevated the trading classes, and brought the commons into position as an influential estate in the commonwealth. Independent of the interest naturally attaching to the history of a mercantile contract of such ancient origin, but so recently introduced, where the general partnership, known to the common law, has hitherto existed alone, I have been led to refer to the facts just stated, for the purpose of showing that the special partnership is, in fact, no novelty, but an institution of considerable antiquity, well known, understood, and regulated. Ducange defines it to be, 'Societas Mercatorum *qua uni sociorum tota negotiationis cura commendatur, certis conditionibus.*' It was always considered a proper partnership (*societas*), with certain reserves and restrictions; and in the ordinance of Louis XIV., of 1673, it is ranked as a regular partnership. In the Code of Commerce, it is classed in the same manner. I may add, as an important fact, for the explanation of a distinction to which I shall shortly advert, that the French code permits a special partnership, of which the capital may be divided into shares or stock, transmissible from hand to hand. In such a case, the death of the special partner does not dissolve the firm, the creation of transmissible shares being a proof that the association is formed *respectu negotii*, and not *respectu personarum;* but, even in such a partnership, the death of the general partner effects a dissolution, unless it is expressly stipulated otherwise. But, says M. Troplong, it would be wrong to extend the rule that a partnership, of which the

resemble each other so much in these that they may be stated generally as follows: —

capital is divided into transmissible shares, is not dissolved by the death of a shareholder, to a special partnership, the capital of which is not so divided. The statute of New York recognizes only the latter kind of partnership; the names of the parties being required to be registered, and any change in the name working a dissolution, and turning the firm into a general partnership. Such a partnership has always been held to be dissolved by the death of the special partner. This partnership remains under the dominion of the common law. It has created between the special and the general partner a tie which is not subjected to the caprice of unforeseen changes; it has produced mutual relations of confidence, which the general partner cannot be forced to extend to strangers. M. Troplong, Comm.; *du Contrat de Société Civile, &c.*, T. 1, *préface*, 57, § 377, &c., T. 2, § 888, p. 368. The French jurists generally take the same position; defining the special partnership as a proper partnership, and applying the law of dissolution by death to all. *Pothier, Traité, du Contrat de Société*, ch. 2, § 2, ch. 8, § 3; *Merlin, Répertoire de Jurisprudence*, art. *Société*, § 7; *Duranton, Droit, Français*, tom. 17, l. 3, tit. 9, § 470. Pardessus discusses the question somewhat at length. *Droit Commercial*, tom. 4, pt. 5, tit. 3, ch. 1, § 4. It might be thought, he says, with some appearance of plausibility, that the rule of a dissolution by death should be limited to general partnerships, in forming which the probity and intelligence of each member have been reciprocally taken into consideration. Indeed, the special partner does not suppose, on the part of the general partners, any personal confidence in the special partners; and, as the interests and the rights of the latter are exclusively limited to their shares, it would seem that they were not modified by their decease, and their heirs called to take their place could have no right to insist that death has dissolved the firm, nor the general partners insist upon that result. These reasons, to question the general rule, appear, nevertheless, to yield to others more decisive. The persons and the character of the special partners have been regarded by the general partners when they formed this kind of association. The special partners are, in effect, to a greater or less extent, called to the annual accountings, to meetings for the settlement of the profits and losses, and to an examination of the state of the affairs. This scrutiny, and a right to insist upon a dissolution in consequence of a breach of the contract, or to urge their claims when the affairs are liquidated, are more or less rigorously exercised. The difficulty of acting harmoniously with different persons, substituted in the place of those with whom the original contract was made, the distrust of heirs, who have not the grounds of esteem and confidence which influenced the deceased, and the impossibility of treating easily with minors, — are some of the reasons which will not permit special partnerships to be excepted from the general rule. It may be objected that these reasons apply only in favor of the general partners, and that it is for them to judge as to the continuation of the business with the heirs. But the heirs of the deceased ought to enjoy the same privilege. Reciprocal rights ought to result from a mutual agreement. There is no solid reason why the special partnership should not be dissolved by the death of one of the partners, except when the capital is divided into transmissible shares; in which case, the associates having consented that each may substitute another in his place, as he may desire, without the authority of the others, it is natural to conclude that the heirs of a deceased member fill his place in the same

* There must be some persons who are general part- *530
ners, all of whose names are used in the firm, without
the addition of * " company," or any other phrase *531
indicating that there are other general partners.

All of these general partners are liable to creditors in precisely the same way as if there were no special partners.

The general partners alone conduct and control the business of the partnership. But, in some States, the statute permits the special partner to examine at his pleasure into the accounts and business of the firm, and give advice in relation to it; and, where this is not expressly permitted, it would doubtless be allowed from its inherent propriety and necessity.

There must be a certificate, signed by all the parties, setting forth sundry particulars, verified by the oath or affirmation of the parties before a magistrate; and, before the business commences, this certificate must be properly advertised, and also recorded with some public records, (*a*) in the place where the parties reside, or where the firm is to do business, or in both, and in every other place where the firm is to do business.

The particulars which this certificate must state are generally these: —

The names of all the partners, distinguishing between those

manner as if he had assigned his share. I have given the substance of the reasoning of Pardessus; and the result he attains has not only the authority of M. Troplong in its favor, but also that of other commentators (*MM. Malpeyre et Jourdain*, No. 474; *M. Persil, Fils*, p. 344), while it does not appear to have been questioned or doubted. (But as to this, see Troubat on Limited Part. (Phila.) 1853, § 430, citing Fierli, vol. 1, 46, 47; *Casaregis de Commer.*, Disc. 29, No. 10; *Zanch de Société*, No. 19, 20). It thus appears that, in the jurisprudence of that nation whence the peculiar contract of a special partnership has been adopted by us, and grafted into our law, — where the system has long existed, is familiarly known, and its nature, qualities, and practical relations to various events and circumstances have been well considered under the light of no brief experience, — the effect of the death of the special partner is to dissolve the firm. This agrees with the conclusion I had attained upon independent reasoning, before consulting those authorities; and I am, consequently, led to pronounce the firm in which the testator was a special partner, dissolved at his death; and to hold the executor, who was his general partner, responsible for the testator's interest in the firm at that time, upon a liquidation of the affairs, as if made then." pp. 329–333. For a similar *résumé*, see Jacquin *v.* Buisson, 11 How. (N. Y.) Prac. 385, et seq., in which the above opinion is concurred in.

(*a*) [The articles do not take effect till they are recorded. As to transactions before that time, the partners are general partners. Levy *v.* Lock, 5 Daly N. Y. C. P. 46.]

who are to be general partners and those who are to be only special partners; and the residences of all.

The name which the firm is to bear. The amount of money actually paid in, in cash, by the special partners.

The nature of the business in which the firm proposes to engage, or for which it is formed.

The time for which the partnership is formed; that is, the day on which it is to begin and the day on which it is to end, or the period for which it is to endure.

All of these are preliminary measures of notice and
*532 precaution. *And the special partner must look to it that all are complied with; for a substantial mistake, or an intended omission or error, by himself or by a general partner, or by any other special partner, destroys the limitation of the partnership, and all the partners stand at once on the common liabilities of partners. (*i*) This is certainly so as to creditors, without exception or qualification. As between the

(*i*) Richardson *v.* Hogg, 38 Penn. 153; [Vandike *v.* Rosskane, 67 Penn. St. 330;] Bowen *v.* Argall, 24 Wend. 496; Madison County Bank *v.* Gould, 5 Hill, 309; Smith *v.* Argall, 6 id. 479; 3 Denio, 435. [A contribution "in cash and goods" is not a contribution "in cash," Van Ingen *v.* Whitman, 62 N. Y. 513; *Re* Merrill, 13 N. B. R. 91; nor is a permission to use certain United States bonds, the bailee not having notice of this permission, Haggerty *v.* Foster, 103 Mass. 17.] One who has not strictly complied with the requisitions of the statutes respecting limited partnerships cannot claim exemption, as a special partner, from liability for the debts of the firm of which he is a member. Thus, the provision in the Gen. Stats., ch. 55, § 2, of Massachusetts, requiring an actual cash payment, as capital, to be made by one who enters a firm as a special partner, in order to exonerate him from liability for the debts of the firm, is not complied with by the delivery to the firm of promissory notes, which are received and treated as cash. And further *held*, that the actual cash payment, as capital, required by the statute, of one who enters a firm as special partner, must be made prior to the publication of the certificate of the formation of the firm. Pierce *v.* Bryant, 5 Allen, 91. [In New York, where the certificate was made, dated, and filed, Dec. 23, 1870, which by its terms was to take effect Jan. 1st 1871, and the special partner at the same time gave his check for the amount of his capital, dated Dec. 31, 1870, to his copartners, this was held not a cash payment. Durand *v.* Abendroth, N. Y. Ct. of App. 15 Alb. J. 289.] A statement in the certificate of the formation of a limited partnership, that the special partner has contributed a certain sum, when, in fact, a portion of that sum has been contributed by another person, with the design of securing the rights and benefits of a special partner without becoming one, renders all the parties liable as general partners. Bulkley *v.* Marks, 15 Abb. Pr. 454. And see Haviland *v.* Chace, 39 Barb. 283; Ward *v.* Newell, 42 id. 482.

partners, their agreements might still be valid, and would then affect their mutual rights and obligations.

Besides these preliminary precautions, there are others, which come into force after the partnership is established, and remain in force so long as it is in operation, which are not less important. The capital is not to be reduced during the partnership. If a special partner withdraws any part of the capital, and the firm becomes insolvent, he is liable to the creditors for the amount so withdrawn, with interest. (*j*) Whether a withdrawal or a * diminution of the capital by a general * 533 partner, without the consent, or knowledge, or with ignorance through negligence, of the special partner, would make him liable, does not distinctly appear; but we should say it would not. (*k*) If the name of the special partner be used in any contract with his consent, and, still more, if he take an active part in the formation of any contract, he is liable upon it as a general partner. (*l*)

(*j*) La Chomette *v.* Thomas, 1 La. Ann. 120; Bulkley *v.* Marks, 15 Abb. Pr. 454. Where, during the continuance of a special partnership, the special partner sold out his interest in the concern to the general partner, for a sum exceeding the amount of the capital he had placed in the business, and for the price of his interest so sold received a security, pledging to him all the personal property of the partnership, it was *held* that this, in effect, amounted to a withdrawal by him of the capital he originally contributed to the copartnership; that he had secured to him that which, by the copartnership, he had contributed in cash, and without security, to be employed in the business, and to stand as indemnity to those who should deal with the partnership; and that the transaction was, in effect, an alteration of the capital of the partnership; and the consequence prescribed by the statute ensued; viz., if the business was carried on, he was thereafter liable as general partner. Beers *v.* Reynolds, 12 Barb. (S. C.) 288, 1 Kernan, 97. But in Lachaise *v.* Marks, 4 E. D. Smith, 610, where there had been an agreement of dissolution, *held*, that the mere giving of notes, payable, at a future time, by the general partners, to the special partner, in the same name as that of the partnership, upon the making of such agreement, with a view of purchasing his interest, is not a withdrawal of capital. The receipt, by the special partner, of dividends, as a device to withdraw capital, will render him liable as a general partner; but dividends may be paid to him in good faith, with only the effect to require him to restore in case the capital shall thereby be unintentionally reduced. Id. In Robinson *v.* McIntosh, 3 E. D. Smith, 221, in a case of limited partnership, it was *held*, that a court of equity has power, at the suit of one partner, to compel another to contribute a sum stipulated as capital, or to restore it to the common fund, if he have withdrawn it before the debts are paid.

(*k*) See Singer *v.* Kelly, 44 Penn. 145.

(*l*) Jonau *v.* Blanchard, 2 Rob. (La.) 513; Madison County Bank *v.* Gould, 5 Hill, 309. In this last case, the

In New York, it is provided that, if the firm make an arrangement for the payment of their debts, and therein make any preference among their creditors, or provide for the special partner as a creditor, the arrangement would be void. (*m*)

court say: "If the defendant, Gould, went beyond advising with his partners, and was actively concerned in negotiating and making the purchase of the mill, he has already rendered himself liable to answer as a general partner, so far as relates to any liability of the partnership growing out of that particular transaction. And we think he must also be deemed a general partner as to all the debts and liabilities of the firm. The legislature has plainly manifested the intention of excluding the special partner from all active participation in the business of the firm; and his interference is forbidden upon the pain of losing his character and protection as a special partner. The moment he engages in the business of the firm, he violates one of the conditions on which his exemption from liability depends, and he becomes a general partner by his own voluntary act." [So if he represents himself to be a general partner. Barrows *v.* Downs, 9 R. I. 446. If a special partner buys out the entire property of the firm before the limitation expires, and continues the business of the firm, he is liable as a general partner from the beginning. First Nat. Bk. *v.* Whitney, 4 Lans. (N. Y.) 34.] See Richardson *v.* Hogg, 38 Penn. 153; McKnight *v.* Ratcliffe, 44 Penn. 156. [If the special terms of the partnership are violated to the advantage of the firm, the firm is liable. Johnson *v.* Bernheim, 76 N. C. 130.]

(*m*) Hayes *v.* Bement, 3 Sandf. 394; Innes *v.* Lansing, 7 Paige, 583; Mills *v.* Argall, 6 Paige, 577; Whitewright *v.* Stimpson, 2 Barb. 379; Jackson *v.* Sheldon, 9 Abb. Pr. 127. But in The Artisans' Bank *v.* Treadwell, 34 Barb. (N. Y.) 553, it was *held*, that, when a limited partnership becomes insolvent, its assets do not, from that time, irrespective of the condition of any creditor's demand, become trust funds for the benefit of all the creditors of the partnership; so as to prevent a creditor, either by superior diligence or by the favor of the partners, from acquiring or possessing a valid lien thereon in preference to other creditors. The assets of the partnership are trust funds for the benefit of the creditors equally, except such as, by superior vigilance, have obtained a lien on the property of the partnership. And they become trust funds for such mode of distribution, so far as any action of the partners is concerned, at the time of insolvency; and, so far as the action of creditors is concerned, at the time the court takes possession of the fund, either by decree or by the appointment of a receiver. Until that time, it is the right of every creditor to seek a preference, and to obtain one, if he can, by superior vigilance. In Hayes *v.* Bement, cited *ante*, in holding that, where a limited partnership becomes insolvent, and the special partner is a general partner in another firm to which the limited partnership is indebted, neither the debt due to such firm, nor such general partner's interest therein, is postponed under the provisions of the statute directing that a special partner shall not claim as a creditor against the limited partnership, of which he is a member, until the claims of all the other creditors are satisfied, — the court say: "The statute authorizing and regulating limited partnerships is strict and severe; and though, perhaps, not unnecessarily so, we are not disposed to put such a construction upon its language as would, in a great measure, impair the usefulness, if not defeat the objects intended to be accomplished by its passage. The

* All suits must be brought by and against the general *534
* partners, unless the special partners have become gen- *535

special partner is under disabilities which are not imposed upon general partners, and, in consideration, he is relieved from liability, except to the extent of the capital which he may contribute; but as in many, if not most, of such limited copartnerships, the bulk of the cash capital is contributed by the special partner, it must generally be for his interest to sustain, as far as possible, and save the partnership when organized, and to prevent its failure or insolvency. If, endeavoring to do this, he becomes a creditor, and still the partnership fails and becomes insolvent, he loses his capital, and his debt is postponed; at the same time, he has not directed or managed its affairs. In cases of corporations, a fixed sum may be paid in as capital; that sum is all that is put at hazard. The parties contributing it may be, and generally are, the chief managers. If the stockholders loan to the corporation, they are put, in case of insolvency, upon the same footing as other creditors: their debt is not postponed. In limited partnerships, which are a kind of *quasi* corporations, the special partner, who contributes his capital, can have no voice in the management of the business; and, if he loans to the firm, his debt must be postponed to those of all the other creditors: and we are now asked to say, that, if any other firm of which he happens to be a member shall loan to such copartnership, even though it be without his knowledge, or shall, in the usual course of business or dealings, become creditors of such copartnership, and such copartnership shall become insolvent, that then the debt of the creditor firm, or, at all events, his interest in such debt, must be postponed. We confess that we do not believe the legislature so intended, and we do not think it has so said. Had the statute provided that the special partner should not, directly or indirectly, neither individually nor jointly, become a creditor, and, if he did, that then any debt due to him individually, or his portion of a debt due jointly, or his interest in any debt due to any other person or persons, corporation or corporations, or to any partnership, whether general or limited, should be postponed, the case would be different. As it now is, we consider that the legislature simply intended to put the special partner, so far as he is a creditor, upon precisely the same footing as if he were a general partner." It was further *held*, in this case, that where the same person is a general partner in two different firms, one of which becomes insolvent, indebted to the other, the latter may recover its debt or dividend from the insolvent or bankrupt firm. Where one general partner in a limited partnership made an assignment, with the consent of the special partner, but without the consent of the remaining general partner, the assignment was set aside. Hayes *v.* Heyer, 3 Sandf. 293; White *v.* Hackett, 24 Barb. (S. C.) 290. *Held*, that, prior to the amendment in the New York statutes (ch. 414 of 1857, § 3), when a special partnership becomes insolvent, and application is made by creditors for an injunction and receiver, a special partner is entitled to come in and claim as a creditor of the partnership, and to receive a dividend, out of the assets thereof, *pro rata* with the other creditors, and that the amendment in the statute was not declaratory of the law as it previously existed. But, reversing this, it was *held*, in s. c. 20 New York, 178, on appeal, that, irrespective of the amendment to the act authorizing the formation of limited partnerships, a special partner could not, in case of the firm's insolvency, claim to share in the distribution of its assets for the reimbursement of loans or advances made by him over and above the capital he contributed, until after all others were

eral partners by some non-compliance with the requirements of law; in which case, they may be joined; and, if the plaintiff seeks to hold them beyond their limited liability, he must join them. (*n*) As the statute is itself exceptional, it must not be enlarged by construction; and the special partners are general partners in all things, excepting those as to which the statute expressly limits their liability. (*o*) If the partnership is renewed after its expiration by its original limits, there must be a renewal of the certificate, publication, and rec-
* 536 ord. (*p*) This partnership may be dissolved by its *own

satisfied; and that the amendment was not declaratory of the existing law, but introduced a new rule. See Fanshawe *v.* Lane, 16 Abb. Prac. 71; Van Alstyne *v.* Cook, 25 N. Y. 489; Ward *v.* Newell, 42 Barb. 482; Singer *v.* Kelly, 44 Penn. 145. See, as to the effect of the attachment of the interest of the special partner, Harris *v.* Murray, 28 N. Y. 574. The special partner cannot claim as a creditor of an insolvent firm of which he is a member. Dunning's Appeal, 44 Penn. 150. [He may in Connecticut, as to loans independent of his special capital contributed. Capp *v.* Lacey, 35 Conn. 463.]

(*n*) The Artisans' Bank *v.* Treadwell, 34 Barb. (S. C.) 553, 560; Schulten *v.* Lord, 4 E. D. Smith, 206. *Held*, in Louisiana, that the fact of there having existed a partnership *in commendam* between the parties does not prevent the plaintiff from recovering of the defendant sums of money paid for the use of the latter, and which were not taken from or connected with the partnership. Battaille *v.* Battaille, 6 La. Ann. 682.

(*o*) Lachaise *v.* Marks, 4 E. D. Smith, 610; Hayes *v.* Bement, 3 Sandf. 397. In Hogg *v.* Ellis, 8 How. Pr. 473, Mitchell, J., says: "The limited partner is a partner as much as the general partner; and there is nothing to prevent him, even during the continuance of the partnership, from taking an active part in its concerns, if he chooses to bring on himself the statutory consequences of a liability as a general partner. The statute is for his protection, if he will conform to it: it is not any part of its policy to prevent him from acting as a general partner, if he is willing to assume the liabilities that follow; and, if he is willing, his partners have no ground of complaint, nor the creditors of the firm, if he leave their rights unimpaired. It would be different if the general partners, by their articles, excluded the limited partner from a control; but then this restriction might cease at the expiration of the partnership. The statute, as to the special partner, is, that 'if he shall interfere, contrary to these provisions, he shall be deemed a general partner' (1 R. S. 766, § 17), and that is the only penalty."

(*p*) Andrews *v.* Schott, 10 Barr (Penn.), 47, 53. And, if this is not done, the partnership, being continued, becomes a general one. Lachaise *v.* Marks, 4 E. D. Smith, 610, 620. If any alteration be made in the capital or shares, and the partnership be in any manner thereafter carried on, before the publication of the notice of dissolution is completed, where the limited partnership is dissolved by the agreement of the parties before the period fixed for its termination by the original certificate, the special partner becomes liable as a general partner. Beers *v.* Reynolds, 12 Barb. (S. C.) 288, and s. c. on appeal, 1 Kernan, 97. See La Chomette *v.* Thomas, 5 Rob. (La.) 172, and Gray *v.* Gibson, 6

limitation, by the death of a partner, (*q*) by decree of court, by bankruptcy of the firm or of a partner, in the same manner as a general partnership. And the special partners will be bound after a dissolution, unless notice is given; excepting where the dissolution comes by limitation of time (and then the certificate is notice), or by an act of the law. (*r*)

Mich. 300, as to the effect of not recording an agreement for the formation of a limited partnership. The parties designated in articles or a will to continue a partnership, or to be interested in it, after a death, should be obliged to renew the formalities of the statute, if they would remain special partners, with the fund alone responsible; and if they continue the business without this form, then they become general partners, liable in like manner as all other dormant partners. Jacquin *v.* Buisson, 11 How. Pr. 386.

(*q*) Troubat on Lim. Part. § 430 (Phila. 1853), makes a distinction as to the death of a special partner, citing Fierli, &c. But this distinction is not sustained in this country. See Ames *v.* Downing, 1 Brad. 321 (which escaped Mr. Troubat's notice), citing several French authorities. And see also Jacquin *v.* Buisson, 11 How. Pr. 385, 395, in which is the following: "Since the decision of this motion, I have noticed the case of Ames *v.* Downing. The Surrogate of New York, in a very able and learned opinion, has arrived at the conclusion herein stated, that the death of a special partner dissolves the firm; and has gone over much of the interesting ground of the French law which I have explored. I find, also, that, in Pennsylvania, there is an express provision in the statute on the subject, for the continuance of the capital of the special partner through his representatives, for the unexpired term, of a sale or the interest, in their discretion. Purdon's Digest Laws, Penn. 544, § 28." See *ante*, * 528, note (*h*).

(*r*) Haggerty *v.* Taylor, 10 Paige, 261; Hogg *v.* Ellis, 8 How. Pr. 473, per Mitchell, J.: "The partnership was a limited one, and it has expired by its own limitation. In ordinary partnerships, it is a matter of course on a bill to close the concern, after the dissolution, to appoint a receiver; and the same rule prevails if the proofs show that, at the hearing, a dissolution will be granted, although the partnership has not yet expired." In Beers *v.* Reynolds, 12 Barb. (S. C.) 291, 1 Kernan, 97, King, J., says: "The statute relative to limited partnerships (2 R. S. 3d ed. p. 52, § 24) is in these words: 'No dissolution of such partnership, by the acts of the parties, shall take place previous to the time specified in the certificate of its formation, or in the certificate of its renewal, until a notice of such dissolution shall have been filed and recorded in the clerk's office in which the original certificate was recorded, and published, once in each week for four weeks, in a newspaper printed in each of the counties where the partnership may have places of business, and in the State paper.' It seems to me that this statute will admit of but one construction, — that, in the case proposed, of a dissolution, by act of the parties, before the expiration of the term for which the partnership was formed, the notice must not only have been filed and recorded, but the full period of publication must also have elapsed, before the partnership can be considered to be dissolved; that the partnership continues until the notice has been published for four weeks. The notice thus prescribed is similar in its nature to that by which the special partnership may be created. The period for which the partnership was to continue has been made known to the public by the filing of the original certificate and its publication in the newspapers. The notice thus

*537 Whether dissolution, by death, *or by bankruptcy, requires notice, is not so certain, and therefore the notice would be expedient. If, however, after a dissolution with notice, or a dissolution by the original limitation or by act of the law without notice, the general partners go on and issue notes bearing the old name, without the consent or permission, actual or constructive, of the special partners, these partners are not liable thereon, even to innocent and ignorant holders, for value. And, even if the special partners had made themselves liable, the holders of these notes cannot come in and claim against the joint assets equally with the previous creditors of the firm. (*s*) If, however, the special partners have made themselves liable on such notes, by permitting their issue in that way, the remedy of the holders is by suit, against all the partners, to charge them personally. (*t*)

given, the statute allows the parties to retract by another notice made public in a similar manner; and, until the provisions of the statute respecting this second notice have been complied with, the public are authorized to rely upon the terms of the first notice." See Marshall *v.* Lambeth, 7 Rob. (La.) 471; Bulkley *v.* Marks, 15 Abb. Pr. 454, 463; Lachaise *v.* Marks, 4 E. D. Smith, 610. [Where a certificate and notice of dissolution is required by statute, it must be strictly complied with. *Re* Terry, 5 Biss. 110.]

(*s*) Haggerty *v.* Taylor, 10 Paige, 261; Lachaise *v.* Marks, 4 E. D. Smith, 610.

(*t*) Haggerty *v.* Taylor, 10 Paige, 261; Schulten *v.* Lord, 4 E. D. Smith, 206, 210. In Bradbury *v.* Smith, 21 Me. 117, where a partnership was formed between A. & B., wherein it was stipulated that the partnership should be special, that B. should be the special partner, and should contribute a certain sum "as capital to the common stock for carrying on the business," which was to be conducted in the name of A. & Co.; and the sum was paid in and invested in goods, and the goods were sold, and other goods purchased in their place with the proceeds of the sales, — it was *held*, that whether the partnership was to be considered as a special one, under the statute, or as a general one, the goods became partnership property; the partnership becoming debtor to the partner advancing the capital, to the amount advanced. In Louisiana, the court *held*, that a partner *in commendam* is responsible to the creditors of the partnership for the amount of the capital he was bound to contribute; and, where his portion of the capital has been withdrawn, the creditors may proceed against him by a direct action. La Chomette *v.* Thomas, 1 La. Ann. 120. Eustis, C. J., in pronouncing the judgment of the court, said: "We have recently recognized the rights of creditors to hold partners *in commendam* responsible for the amount of the capital which they were bound to put into the partnership of which they were members. Civil Code, art. 2813. We will prevent the creditors from obtaining any undue preference over each other, and, in all cases, carry into effect the principle of law which makes the *commendam* fund a common pledge for the creditors of the partnership; but we will permit no obstacle of mere form to prevent the direct recourse of the creditor against the partner *in commendam*,

* Defects in the certificate, or publication or record, *538 or in any compliance with the requirements of the law, do not vitiate, if these defects are merely formal, and such as cannot injuriously mislead any party. But, if they are substantial, — that is, if they can be injurious, — they leave all the partners liable as general partners, although none of them were in fault. (*u*)

Thus, a publication that the partnership would begin on the 16th of November, when it actually began on the 16th of October, was held not to bind the special partners as general partners. But it was said that it would have bound them if the error had been intentional, or if the debt sued had been contracted before the 16th of November. (*v*)

whenever his obligation to contribute to the partnership debts is made out. In the present case, the partner *in commendam* has not only withdrawn his capital on the dissolution of the partnership, but his share of the profits; and why should he not pay his share of the debts?" See further, as to the liability of the special partner, Pierce *v.* Bryant, 5 Allen, 91; Marshall *v.* Lambeth, 7 Rob. (La.) 471; De Lizardi *v.* Gosset, 1 La. Ann. 138; Beers *v.* Reynolds, 1 Kernan, 97. For a debt owing by all the partners, general and special, in a limited partnership, a suit is well brought against the general partners alone. And a judgment and execution in such suit, levied upon the property of the partnership, will bind the entire interest of all the partners. The provision of the statute, that suits in relation to the business of a limited partnership "may be brought and conducted by and against the general partners, in the same manner as if there were no special partners," must be construed to mean, not only that they may be thus brought "in the same manner," but "with the same effect." The Artisans' Bank *v.* Treadwell, 34 Barb. (S. C.) 553. And see Bulkley *v.* Marks, 15 Abb. Pr. 454, s. c. *nom.* Buckley *v.* Bramhall, 24 How. Pr. 455; Robinson *v.* McIntosh, 3 E. D. Smith, 221; Hastings *v.* Hopkinson, 28 Vt. 108, 117.

(*u*) Andrews *v.* Schott, 10 Barr (Penn.), 47; Bowen *v.* Argall, 24 Wend. 496; Smith *v.* Argall, 6 Hill, 479, 3 Denio, 435; Lachaise *v.* Marks, 4 E. D. Smith, 610. In this last case, where the certificate of the formation of a limited partnership declared "that all the general partners interested therein are A. and B., both of Brooklyn, in the State of New York, and that the special partner interested therein is C., of Jersey City, in the State of New Jersey," — it was *held*, that this was a compliance with the statute (2 N. Y. R. S. 4th ed. p. 174, § 4, subd. 3), requiring the certificate to contain the respective places of residence of the general and special partners, and that no more distinct averment of their being residents of those places was necessary. See also Bulkley *v.* Marks, 15 Abb. Pr. 454, s. c. *nom.* Buckley *v.* Bramhall, 24 How. Pr. 455. [If the firm moves its business into another county than that where the certificate has been recorded, they become general partners till the certificate is newly recorded. Riper *v.* Poppenhausen, 43 N. Y. 68.]

(*v*) The Madison County Bank *v.* Gould, 5 Hill, 309. And see Bradbury *v.* Smith, 21 Me. 117.

So, a publication of the certificate was held to have been made "immediately" within the terms of the statute, when it was made within three days after the recording. And it was held sufficient, if made once in each of the succeeding six weeks. (*w*)

*539 *Where real estate was purchased by the general partners for the firm, and paid for by the firm, the circumstance that the title to the land was taken in the names of all the partners did not make the special partners liable as general partners. Stress was laid upon the fact that the special partners did not know that the land was so granted to them. But, if they did know this and consent to it, it does not seem clear, on general principles, why they should be held as general partners, provided they had complied in all things with the requirements of the law. Perhaps they should be so held, however, to the vendors, for the price of the land. (*x*)

But where the certificate was published in two newspapers, and in one of them the sum contributed was said to be five thousand dollars, when in fact it was but two thousand, and the mistake was made by the printer, it was held that the special partners were liable as general partners, without proof that the creditors were misled by the mistake. (*y*)

(*w*) Bowen *v.* Argall, 24 Wend. 496. An affidavit to accompany a certificate of a limited partnership, under N. Y. Rev. Sts. (4th ed.) p. 174, § 7, need not follow the exact words of the statute. If it clearly establishes the facts required by the statute, it is sufficient. Thus, an affidavit that the special partner has "actually paid in" the capital contributed by him, is held equivalent to an affidavit that he has paid it "in cash." Johnson *v.* McDonald, 2 Abb. Pr. 290.

(*x*) The Madison County Bank *v.* Gould, 5 Hill, 309.

(*y*) Argall *v.* Smith, in the Court of Errors, 3 Denio, 435, per Spencer, Senator: "The 'terms' must be truly published in two papers. Not to publish at all would be clearly fatal; and it would be equally so to publish in but one paper, or in papers in any other senate district. That the amount of the capital actually paid in by the special partner would be a substantial and material portion of the terms, cannot be doubted. It is the foundation of the credit to be given. The duty of making such publication is by the statute devolved upon the partners; and it is one that they must see to at their peril. If they fail in this, the consequence is declared in plain terms: 'the partnership shall be deemed general.' In this the courts have no discretion. They have only to declare the will of the legislature. The publication of different 'terms' in two papers, in one of which they are untruly stated, can be no better than to omit a publication altogether." See the same case in the Supreme Court, *nom.* Smith *v.* Argall, 6 Hill, 479. And see Bowen *v.* Argall, 24 Wend. 496.

The certificate, being duly sworn to, acknowledged, and recorded, is *primâ facie* evidence of its own truth, and may be offered as such ; but has no force to rebut positive testimony of its falsehood. Thus the certificate cannot contradict, as evidence, testimony going to show that the sum actually paid in was less than that stated. (*z*)

* In some of the States, there seems to be no restric- * 540
tion as to the purposes for which these special partnerships may be formed. In others, certain objects or kinds of business are enumerated, which they may carry on. In others, some are excepted ; as banking and insurance. In many of the States, in which limited partnerships are permitted, banking is prohibited, except by corporations expressly authorized. But the business of insurance is generally open ; and we see no reason, derivable from its nature, why a limited partnership might not engage in it. In this country, the whole business of insurance is now so entirely in the hands of corporations, — mutual, or stock companies, or those which unite both characters, — that there is no probability of its being done or attempted by individuals or mere partnerships. (*a*)

(*z*) The Madison County Bank *v.* Gould, 5 Hill, 309, 315. *Held*, in Michigan, that an agreement for the formation of a limited partnership, executed under the laws of New York, but not recorded so as to become effectual for the purpose designed, has no tendency to prove an actual general partnership between the parties named in it, in the absence of extrinsic evidence to show that they had actually entered into business as partners. Gray *v.* Gibson, 6 Mich. 300. [A special partner of a firm in one State is exempt from general liability on account of transactions of his firm with the citizens of another State. King *v.* Sawin, 14 N. Y. S. C. 167. See also Barrows *v.* Downs, 9 R. I. 446. Where one who has given credit to a partnership which he believes to be a limited partnership, and which is known to the public as such, afterwards seeks to charge all the partners as general partners, the burden of proof to show a general partnership is on him. Whilldin *v.* Bullock, 4 Weekly Notes of Cases, 234.]

(*a*) See *ante*, note (*d*), p. * 527.

CHAPTER XVIII.

OF JOINT-STOCK COMPANIES.

In England, where incorporation is difficult and costly, joint-stock companies are very common, and are regulated by statute. (*a*) In this country, where incorporation is in fact, though not in form, almost at the pleasure of the parties, and limited partnerships protect from indefinite loss, joint-stock companies are less frequently found. They exist, however, in many of our States, and have given rise to interesting questions. In general, they are copartnerships, and are subject to the whole law of partnership. (*b*) They are, however, partnerships of a very peculiar kind.

(*a*) The Joint-Stock Companies' Acts are, 7 Wm. 4 and 1 Vict. ch. 73; 7 & 8 Vict. ch. 110, 111; Companies' Clauses Consolidation Act, 8 & 9 Vict. ch. 16; Joint Stock Banks' Acts, 7 Geo. 4, ch. 46, and 1 & 2 Vict. ch. 96; 5 & 6 Vict. ch. 85; 7 & 8 Vict. ch. 113. The later acts are, 9 & 10 Vict. ch. 28, 75; 10 & 11 Vict. ch. 78; 11 & 12 Vict. ch. 45; 12 & 13 Vict. ch. 108; 17 & 18 Vict. ch. 73; 18 & 19 Vict. ch. 133; 19 & 20 Vict. ch. 3, 47, 100; 20 & 21 Vict. ch. 14, 49, 78; 21 & 22 Vict. ch. 60, 91.

(*b*) In Williams *v.* The Bank of Michigan, 7 Wend. 542, Walworth, Ch., says: "It is well-known, that there are and have been many joint-stock, and even banking, companies which are mere partnerships, as to every person except their own stockholders; they never having been legally incorporated. Whatever name such a company may assume and use in the transaction of its business, it is a partnership, and not a corporate, designation; and every suit, upon a contract with the company, must be brought in the names of the several persons composing the firm." See The King *v.* Dodd, 9 East, 516; Holmes *v.* Higgins, 1 B. & C. 74; Hess *v.* Werts, 4 Serg. & R. 356; Carlen *v.* Drury, 1 Ves. & B. 157; Keesley *v.* Cadd, cited in Perring *v.* Hone, 2 Car. & P. 401; Vigers *v.* Sainet, 13 La. 300; Walburn *v.* Ingilby, 1 Mylne & K. 61; Gorman *v.* Russell, 18 Cal. 688; Robbins *v.* Butler, 24 Ill. 387; Tenney *v.* The N. E. Protective Union, 37 Vt. 64. [Where such associations fail to become legally constituted joint-stock companies, from some informality or other, they constitute partnerships. Whipple *v.* Parker, 29 Mich. 370. They are partnerships, except as otherwise provided by statute. Moore *v.* Brink, 6 T. & C. (N. Y.) 227; Manning *v.* Gasharie, 27 Ind. 399. Stockholders in a business corporation, who, after expiration of their charter, continue business, and authorize contracts to be made in the name of the copartners, are partners. National Bank *v.* Landon, 45 N. Y. 419. As to when the partnership of the associates in a joint-stock company, unincorporated, begins, see

The question has been raised, whether they were not illegal on the ground that they usurp the privileges of corporations. (*c*) It never came to a decision; and we can see no ground for raising such a question, or for denying to copartners the power of * regulating their own business, form, name, * 542 and rules of proceeding, at their own pleasure. (*d*)

Sometimes, in our joint-stock companies, all the property is in trustees, who alone have the legal title; and the copartners, as shareholders, under an indenture which declares the trust, have the equitable or beneficial estate. In law, this might make some important differences; but much less in equity. (*e*)

Universally they imitate, more or less, the form and appearance of corporations. They have a common name, which is usually descriptive of their business, like that of a corporation; and does not contain or consist of the names of persons, like the name of a firm. (*f*) They have their officers, their by-

Hedge's Appeal, 63 Penn. St. 273. Members of a corporation, to whom a certificate of organization has been duly issued, are not responsible as partners, as to liabilities contracted before they had complied with the provision of the statutes. First Nat. Bank, &c. *v.* Almy, 119 Mass. 476. The statutes of one State, having no extra-territorial efficacy, joint stockholders in that State become partners in another. Taft *v.* Ward, 106 Mass. 518. See also Gott *v.* Dinsmore, 111 Mass. 45. As to what facts would authorize a jury to find a partnership in such a case, see Taft *v.* Ward, 111 Mass. 518.]

(*c*) Story on Part. § 164; Collyer on Part. 615-624, 1st ed. And see cases cited in the following note.

(*d*) In England, the Stat. 6 Geo. 1 ch. 18, enacted the year after the infamous South Sea project had beggared many persons, made it highly penal for subscribers to public undertakings to "presume to act as if they were corporate bodies, by making their shares in stock transferable," &c., 4 Bl. Comm. 117; Duvergier *v.* Fellows, 5 Bing. 248, 10 B. & C. 826; Josephs *v.* Pebrer, 3 B. & C. 639; Blundell *v.* Winsor, 8 Sim. 601; Garrard *v.* Hardey, 5 Man. & G. 471; Harrison *v.* Heathorn, 6 id. 81. The Stat. 6 Geo. 1, ch. 18, was in part repealed by 1 Vict. ch. 73. The Act of 7 & 8 Vict. ch. 110, came into force on the first of November, 1844. A railway company was incorporated by an act before that date. Subsequently thereto, the company obtained an act for an extension line: it was *held* that the latter undertaking was not a partnership, the formation of which was commenced after the first of November, 1844, within the meaning of the act. Shaw *v.* Holland, 15 M. & W. 136, 4 Railw. Cas. 150. And see Baker *v.* Plaskitt, 5 C. B. 262, 5 Railw. Cas. 117.

(*e*) An act under which the property of a manufacturing company, including its right to call assessments and the liability of stockholders for its debts, is vested in trustees for distribution among the creditors, is a bar to a suit by a creditor against a stockholder, under an act making members of manufacturing companies liable for their debts. Walker *v.* Crain, 17 Barb. 119.

(*f*) In Regina *v.* Registrar of Joint-stock Companies, 10 Q. B. 839, Lord Denman *held*, that a joint-stock com-

*543 laws, (*g*) and their * rules of proceeding: and by these they regulate the election of officers, the transaction of business, the transfer of shares, and the like; and, generally, in the mode of transfer, forms are used like those of incorporated companies, — as, for example, certificates (or "scrip") are issued, transfers are recorded, &c. They do not, so far as we know, attempt to use a common seal, and certainly have no power to do this; that is, in law, they have no common seal, and therefore cannot make a deed of any kind. (*h*)

We repeat, that we see no reason why they may not legally and innocently do all the things they usually undertake to do; nor why the courts, of law and of equity, must not apply to them the common principles, which, in the first place, permit all partners to agree upon what terms of partnership they will; and, in the second place, hold these terms to be binding upon all

pany completely registered under Stat. 7 & 8 Vict. ch. 110, and thereby "incorporated," has no power thereafter to change its name. He said: "The identity of name is the principal means for effecting that perpetuity of succession, with members frequently changing, which is an important purpose of incorporation. The statute does not express any intention of changing this general principle, but, by section 25, incorporates the company by the name set forth in the deed, and declares that it shall continue *so* incorporated until it shall be dissolved." It was contended, that, as partnerships were at liberty to change their style, that joint-stock companies were in the nature of trading partnerships; and that, as there was no express prohibition in the statute, they might continue to do so. But it was *held*, that, when the company became incorporated, its power to change its name ceased. See 2 Bac. Abr. tit. "Corporations" (C.), 1, 7th ed. A joint-stock company has no right, between the time of provisional and complete registration, to change its name; nor has a provisionally registered company a right to assume the name of a corporation. Regina *v.* Whitmarsh, 19 L. J., Q. B. 185.

(*g*) For the power of companies to make by-laws, and the limitations on this power, see Calder and Hebble Nav. Co. *v.* Pilling, 14 M. & W. 209, 3 Railw. Cas. 735; Chilton *v.* London and Croyden R. Co., 16 M. & W. 212, 5 Railw. Cas. 4; Child *v.* Hudson's Bay Co., 2 P. Wms. 309; Smith *v.* Goldsworthy, 4 Q. B. 430; Ward *v.* Society of Attorneys, 1 Collyer, 379.

(*h*) Gow on Part. 3. In England, it has been *held*, that, notwithstanding their statutes, joint-stock companies completely registered are bound by contracts made by a competent board of directors, though not under seal, or made in compliance with the statute, and though they cannot enforce such contracts. But persons seeking to render those companies liable on contracts made with the directors, must show their authority to bind the company, either by the provision of the registered deed of settlement, or by proof that the body of shareholders authorized particular individuals to make contracts binding on the company. A ratification by a competent board of directors will bind the company. Ridley *v.* Plymouth, &c. Grinding and Baking Co., 2 Exch. 711; Forrester *v.* Bell, 10 Irish Law, 555. See Smith *v.* The Hull Glass Co., 19 L. J., C. P. 123.

who agree to them, expressly or impliedly; and, in the third place, hold them to be binding upon no other persons. (*i*) It may be said, however, that the rule already repeatedly mentioned — that special agreements between partners affect third parties to whom they are known, and who deal with the partnership with that knowledge — would apply to joint-stock partnerships.

It seems to be intimated in England, that a partner in a joint-stock company, which had formed certain rules, would not in any case be liable, beyond them, to a third party who had traded with the company with a knowledge of these rules. This impression (for it can hardly be called more) seems to be derived, in some measure, from the statutory existence and regulation of * joint-stock companies in England. (*j*) * 544 In this country, we know neither reason nor authority for qualifying, in reference to these companies, the general principles of partnership on this point. That is, we do not believe that a joint-stock company, or any other partnership, can limit its own liabilities, and become a corporation or limited partnership by its own act, and without any regard to the formalities or requirements of the law; but we see no reason why a joint-stock company may not go as far as a common partnership in this direction. (*k*)

(*i*) See Hess *v.* Werts, 4 Serg. & R. 361; Skinner *v.* Dayton, 19 Johns. 537; Blundell *v.* Winsor, 8 Sim. 601; Walburn *v.* Ingilby, 1 Mylne & K. 61, 76; *In re* Sea, F. & L. Ass. Soc., 5 De Gex, M. & G. 465, 23 Eng. L. & Eq. 422; *In re* Worcester Corn Ex. Co., 3 De Gex, M. & G. 180, 19 Eng. L. & Eq. 627; Hallett *v.* Dowdall, 18 Q. B. 2, 9 Eng. L. & Eq. 347; Penn. Ins. Co. *v.* Murphy, 5 Minn. 56; Henry *v.* Jackson, 37 Vt. 431.

(*j*) Blundell *v.* Winsor, 8 Sim. 601; Walburn *v.* Ingilby, 1 Mylne & K. 51, 76.

(*k*) In Hess *v.* Werts, 4 Serg. & R. 366, which is a highly instructive case on this question, where an association gave notes promising to pay certain amounts out of their joint funds, it was *held*, that all the shareholders were personally liable. After considering the special facts relating to the articles of association, Duncan, J., observed: "Nor would I have any difficulty were the articles of association more explicit than they are, and excluded from responsibility the associators, other than out of their joint funds; for though they might, as between themselves, stipulate with each other for this contracted responsibility, yet as to the rest of the world, it is clear, that each partner is liable to the whole amount of the debts contracted. For partners in a stock divided into shares, and transferable (but who are not incorporated), are responsible beyond the amount of the shares to which they subscribe, though it is one of the terms of the association they shall not be." In the same case, Gibson, J., said: "By the terms of their notes, the defendants engaged to pay 'out

Excepting so far as the liability of a partner in one of these companies is so qualified, he is — although he may call himself not a partner, but a stockholder — liable precisely as a partner. (*l*)

of their joint funds, according to their articles of association,' and it is made part of the case that they have no joint funds. Shall they be compelled to pay out of their separate estates? It is a general principle, that partners are liable to third persons as for a personal debt. It is not merely the stock they bring into the partnership that is hazarded; but they are responsible to the extent of their individual fortunes; and such responsibility cannot be limited by any proviso in the articles of partnership, or agreement between themselves. But I see no reason to doubt but they may limit their responsibility by an explicit stipulation made with the party with whom they contract, and clearly understood by him at the time." King *v.* Dodd, 9 East, 527. And see Skinner *v.* Dayton, 19 Johns. 537. The directors of a joint-stock company, unless restrained by act of Parliament or the deed of settlement, would seem to have all the authority given to partners at common law; and, therefore, where parties contract with the directors in matters relating to the copartnership business, they are not bound, when seeking to enforce such contracts, to show that the directors were authorized by the deed or by-laws to enter into them. Smith *v.* The Hull Glass Co., 19 L. J., C. P. 123. See Thompson *v.* Wesleyan Newspaper Association, id. 114; Tyrrell *v.* Washburn, 6 Allen, 466.

(*l*) See *ante*, p. * 541, note (*b*); Pipe *v.* Bateman, 1 Iowa, 369; Babb *v.* Read, 5 Rawle, 151; Attorney-General *v.* Heelis, 2 Sim. & S. 67; McGill *v.* Brown, Baldwin, C. C. 66; Thomas *v.* Elmaker, 1 Pars. Sel. Eq. Cas. 103; Lloyd *v.* Loaring, 6 Ves. 773; Cullen *v.* The Duke of Queensbury, 1 Bro. Ch. Cas. 103; Pearce *v.* Piper, 17 Ves. 1; Cockburn *v.* Thompson, 16 id. 321; Beaumont *v.* Meredith, 2 Ves. & B. 180; Keasley *v.* Codd, 2 Car. & P. 408, note; Carlen *v.* Drury, 1 Ves. & B. 154, 157; Tappan *v.* Bailey, 4 Metc. 535. But see, for a limitation on the law of partnership, as applied to joint-stock companies, Cox *v.* Bodfish, 35 Me. 302; Livingston *v.* Lynch, 4 Johns. Ch. 573; Irvine *v.* Forbes, 11 Barb. 588. Where, by an act of Parliament, a company was to apply the first moneys received under the act in discharge of the expenses incurred in obtaining the act, it was *held*, that the plaintiff, though a member of the company, might sue them for his time and trouble and money expended in obtaining the act. Carden *v.* The General Cemetery Co., 5 Bing. N. C. 253. See Tilson *v.* Warwick Gas Light Co., 4 B. & C. 962. A member of a joint-stock company, like a member of an ordinary partnership, may recover compensation for service rendered to the company previous to his having become a member of it. Lucas *v.* Beach, 1 Man. & G. 417. In general, however, an action cannot be maintained by a member against the company, or by the company against a member, on a contract between him and the company. Neale *v.* Turton, 4 Bing. 149; Wilson *v.* Curzon, 15 M. & W. 532; Holmes *v.* Higgins, 1 B. & C. 74; Goddard *v.* Hodges, 1 Cromp. & M. 33, 3 Tyrw. 209; Teague *v.* Hubbard, 1 Man. & R. 369, 8 B. & C. 345; Chadwick *v.* Clarke, 1 C. B. 700; Moneypenny *v.* Hartland, 1 Car. & P. 352, 2 id. 378; Parkin *v.* Fry, id. 311; Milburn *v.* Codd, 1 Manning & R. 238, 7 B. & C. 419; Goddard *v.* Hodges, 3 Tyrw. 209, 1 Cromp. & M. 33; Perring *v.* Hare, 4 Bing. 28. But see Davies *v.* Hawkins, 3 Maule & S. 488. [The stockholders of a banking association doing business under ordinary copartnership articles are not dormant partners, although only the name of the bank is disclosed to the public.

* There is one difference which we incline to think * 545
the law would make between a common partnership and a joint-stock company. It is as to dissolution by change. We have already remarked that it is very possible, that, where a stockholder sold and transferred his share or interest in all respects as the rules required, giving up his certificate, and a new one was made to his transferee, the law would hold that this change operated no dissolution, but that the new partner or stockholder came into the place of the old one, and the partnership or company went on. (*m*) And the same thing might occur in a case of a change by death. * We * 546 should say, however, with much confidence, that the company were still a partnership, and like a partnership in the following respects : —

First. Any stockholder might transfer his interest in any way which would operate a transfer at common law, and pay no regard to the rules of the company, and yet give good title to the transferee, so far as the property was concerned. (*n*)

They are responsible till notice of retirement; and a new stockholder is not liable for debts contracted before he became a member of the firm. Shamburg *v.* Ruggles, Sup. Ct. Penn., 15 Alb. L. J. 107, s. c. 3 Weekly Notes, p. 293.]

(*m*) Adams' Eq. (3d Am. ed.) 544; Young *v.* Keighly, 15 Ves. 577; Duvergier *v.* Fellows, 5 Bing. 248; Blundell *v.* Winsor, 8 Sim. 605; Harrison *v.* Heathorn, 6 Scott N. R. 735, 12 L. J. C. P. 282; Pinkett *v.* Wright, 2 Hare, 120, 130. If several persons subscribe an agreement, *inter se*, to promote a joint undertaking, one of them cannot withdraw his name, and discharge himself from the engagement, without the consent of the rest. And if an act of Parliament pass for effectuating the purpose of the undertaking, by which certain obligations are created, such original subscriber is not exonerated from the liabilities imposed by the act, by having, during the progress of the bill, renounced before the committee, all further connection with the undertaking, and desired that his name might be, in consequence, omitted in the act; nor can the circumstance of his name being so omitted have the effect of disengaging him. Kidwelly Canal Co. *v.* Raby, 2 Price, 93. See Scott *v.* Berkeley, 3 C. B 925, 5 Railway Cas. 51; Stimson *v.* Lewis, 36 Vt. 91.

(*n*) See Pratt *v.* Hutchinson, 15 East, 511; Rex *v.* Webb, 14 id. 406; Josephs *v.* Pebrer, 3 B. & C. 639; Fox *v.* Clifton, 9 Bing. 115, 6 id. 776. Where a company was formed, by act of Parliament, for the purchase of lands to make a canal, and the act declared that the shares shall be deemed personal estate, and shall be transmissible as such, "it was *held*, that, though the profits arose out of the land, the shares were personal property, passing, as such, to the assignees on the bankruptcy of a proprietor." *Ex parte* Lancaster Canal Co., 1 Deac. & Ch. 411, Mont. 116. See Bradley *v.* Holdsworth, 3 M. & W. 422; Bligh *v.* Brent, 2 Younge & C. 268. Where an act prescribes certain forms in the transfer of shares, unless they are strictly complied with, the shares remain in the order and dispo-

Secondly. That this transferee would neither be a partner by such irregular transfer, nor have any claim against the company to be a partner. (*o*)

Thirdly. This transferee, or an execution creditor of a copartner, member, or stockholder, might require an account and settlement, so far as to ascertain his rights and the value of his share; but would have no right to any particular thing *in specie*, nor to a division of the effects; and a court of equity would probably deny him a sale of the whole, if a fair equivalent for his ascertained share were offered him in money. (*p*)

Fourthly. If a stockholder transferred his share agreeably to all the rules of the company, the company might,
* 547 nevertheless, * with or without reason, refuse to accept the transferee as a partner, and withhold his certificate. That is, they might do so, so far as to prevent his becoming a copartner; for we should say that the company was still so far a partnership and not a corporation, that without the assent of the members no person could become a partner. If the new certificate were issued, and no objection made, their assent would be implied; but, if it were expressly withheld, we should say the transferee did not become a partner. He was still a transferee of the property, and this he might realize without joining the company. So, too, if the company were willing to receive him, and the transferee were not willing to join them, we should say he was no partner, although he held the transferred interest. (*q*)

sition of the proprietor; the ordinary mode of transferring not constituting an equitable mortgage. *Ex parte* Lancaster Canal Co., *ante*.

(*o*) Bray *v.* Fromont, 6 Madd. 5; Jefferys *v.* Smith, 3 Russ. 158; Kingman *v.* Spurr, 7 Pick. 235, 238; Gilmore *v.* Black, 2 Fairf. 488; Putnam *v.* Wise, 1 Hill, 234; Murray *v.* Bogart, 14 Johns. 318; Marquand *v.* New York Manuf. Co., 17 id. 535; Griswold *v.* Waddington, 15 id. 82; Moddewell *v.* Keever, 8 Watts & S. 63. See Hare *v.* Waring, 3 M. & W. 362; Harper *v.* Raymond, 3 Bosw. 29, 7 Abb. Prac. 142; Pratt *v.* Hutchinson, 15 East, 511.

(*p*) Kingman *v.* Spurr, 7 Pick. 235; Mason *v.* McConnell, 1 Whart. 381; Putnam *v.* Wise, 1 Hill, 234. See Burnes *v.* Pennell, 2 H. L. Cas. 497. The assignee of a stockholder in an insolvent corporation succeeds to the same rights and liabilities as attached to his assignor. James *v.* Woodruff, 2 Denio, 574. And see Weald of Kent Canal Co. *v.* Robinson, 5 Taunt. 801; Blount *v.* Hipkins, 7 Sim. 51. As to the power of a bond creditor of a company to inspect their books, see Pontet *v.* Basingstoke Canal Co., 2 Scott, 543; Hill *v.* Manchester and Salford Water Works Co., 5 B. & Ad. 866; Clarke *v.* The Imperial Gas Co., 7 Bing. 95, 4 B. & Ad. 315.

(*q*) See Jefferys *v.* Smith, 3 Russ.

It would always be possible that the articles of agreement might be such as to give to the transferrer, or possibly to the transferee, a suit at law for damages, or at equity for performance, if the company refused to receive him. But still their refusal would prevent his being a partner. So, too, the articles might be such as greatly to qualify the transferee's right to hold or realize the interest consigned to him, if he refused to become a stockholder. But still he would not become one, by the mere transfer, without consent on his part. Possibly the rules might be such, that accepting the transfer accepted the partnership; but, even then, an execution creditor of the partner, or one buying the share on a sale by the officer, would take the interest, we think, and not be a partner without his own consent and act. (*r*)

In some parts of this country, there are partnerships which, without being strictly joint-stock companies, are more like them in their articles and regulations and manner of conducting business than common mercantile copartnerships; as, for example, the mining partnerships of California. (*rr*)

158; Harper *v.* Raymond, 3 Bosw. 29; Tatam *v.* Williams, 3 Hare, 347; Nicoll *v.* Mumford, 4 Johns. Ch. 522; Rodriguez *v.* Heffernan, 5 id. 417; Marquand *v.* The New York Manuf. Co. 17 Johns. 525.

(*r*) 1 Pars. on Con. (5th ed.) 144; Pratt *v.* Hutchinson, 15 East, 511; Rex *v.* Webb, 14 id. 406; Josephs *v.* Pebrer, 3 B. & C. 639; Fox *v.* Clifton, 9 Bing. 115, 6 id. 776; Young *v.* Keighly, 15 Ves. 557; Duvergier *v.* Fellows, 5 Bing. 248; Blundell *v.* Winsor, 8 Sim. 601; Harrison *v.* Heathorn, 6 Scott N. R. 725, 12 L. J. C. P. 282; Pinkett *v.* Wright, 120, 130; Mathewson *v.* Clarke, 6 How. (U. S.) 122.

(*rr*) A leading case on this subject is Settembre *v.* Putnam, 30 Cal. 490. [Such partnerships, when there are no partnership articles, are subject to the ordinary law of partnership, except so far as general usages of persons engaged in similar pursuits, or the known practice of the particular company, has established a different rule; the only differences generally existing being such as flow from the fact that in such partnerships there is no *delectus personæ*. Jones *v.* Clark, 42 Cal. 180; Taylor *v.* Castle, id. 367. See also, McConnell *v.* Denvers, 35 Cal. 365.]

CHAPTER XIX.

OF PART-OWNERS OF SHIPS.

SECTION I.

OF THE PECULIAR NATURE OF PART-OWNERSHIP OF SHIPS.

JOINT-OWNERS are either joint-tenants, or tenants in common, or partners; the difference between the last and the two former has already been considered. Joint-tenancy seldom exists now, excepting as to land; but all the incidents of joint-tenancy (as the right of survivorship, &c.) may be given to a tenancy in common, by agreement of the parties. For there is nothing to prevent their putting to their ownership whatever limitations or qualities they prefer. (*a*)

Of the common rules and principles in relation to tenancy in common, it seems hardly necessary to say more than *549 will be * involved in what we have to offer concern-

(*a*) The cases on these questions are very numerous. See the following, in which the different kinds of interest are fully considered: Graves *v.* Sawcer, T. Raym. 15; *Ex parte* Young, 2 Ves. & B. 242; *Ex parte* Harrison, 2 Rose, 76; Owston *v.* Ogle, 13 East, 538; Helme *v.* Smith, 7 Bing. 709; Rex *v.* Collector of The Customs, 2 Maule & S. 223; Green *v.* Briggs, 6 Hare, 395; Bulkley *v.* Barber, 6 Exch. 164, 1 Eng. L. & Eq. 506; Mumford *v.* Nicoll, 20 Johns. 611; Thorndike *v.* De Wolf, 6 Pick. 120; French *v.* Price, 24 id. 13; Jackson *v.* Robinson, 3 Mason, 138; Hopkins *v.* Forsyth, 14 Penn. 38; Lamb *v.* Durant, 12 Mass. 54; Merrill *v.* Bartlett, 6 Pick. 46; Harding *v.* Foxcroft, 6 Greenl. 76; Patterson *v.* Chalmers, 7 B. Mon. 595, 598; Milburn *v.* Guyther, 8 Gill, 92; Macey *v.* De Wolf, 3 Woodb. & M. 193, 205; Knox *v.* Campbell, 1 Penn. 366; Buddington *v.* Stewart, 14 Conn. 404; Revens *v.* Davis, 2 Paine C. C. 202; Doddington *v.* Hallett, 1 Ves. Sen. 497; Wright *v.* Hunter, 1 East, 20; Phillips *v.* Purington, 15 Me. 425; Seabrook *v.* Rose, 2 Hill Ch. 553; Patterson *v.* Chalmers, 7 B. Mon. 595; Hewitt *v.* Sturdevant, 4 B. Mon. 453; De Wolf *v.* Gardiner, 2 Paine C. C. 356; Rex *v.* Philip, 1 Moody C. C. 274; Luke *v.* Gibson, 1 Abr. Eq. 290; Jefferys *v.* Small, 1 Vern. 217, 3 P. Wms. 158. Part-owners of a ship are tenants in common of it, but joint-owners of her use and employment. Trower on Debt. and Cred. 194, citing Smith Merc. Law, 199. See Owens *v.* Davis, 15 La. Ann. 22.

ing the joint-ownership of one species of property, very peculiar in itself, and of which the common law, following or rather adopting the law-merchant, has acknowledged the peculiarities. We refer to ships; using the word of course in the ancient and large sense, as including all water-borne vessels, for carriage of men or merchandise.

The part-owners of ships are more than ordinary tenants in common, but not so much as partners. And their mutual rights, obligations, and remedies, and their relations to third parties, are determined by a system of law older in fact than the law of partnership, but not yet fully adopted by the common law, nor perfectly adapted to the exigencies of modern commerce; and, therefore, not without exhibiting some questions of moment to which it is difficult, if not impossible, to find, at present, a definite and certain answer. The whole law of part-owners of ships is the law of shipping; a subject vast in itself, and which we certainly should not think of introducing here as an appendix to the law of partnership. But a brief and condensed statement of the general powers, rights, and duties of part-owners of ships, we shall endeavor to make.

The several owners of ships owned in shares are, in general, only tenants in common as to the ship; but they may be, and often are, copartners as to the earnings of the ship in any voyage on which it is sent. (*aa*)

A ship is a personal chattel. (*b*) This is certain, however peculiar it may be; for the common law recognizes only the broad distinction between personal chattels and real estate. And a ship, certainly, is not real estate. But it is like it in some important respects: and some things would be gained, perhaps, if the law respecting title and transfer assimilated the

(*aa*) Merritt *v.* Walsh, 32 N. Y. 685.

(*b*) In Taggard *v.* Loring, 16 Mass. 339, Parker, C. J., says: "We have not been able to find that a vessel may not be hired for a voyage, or for a certain time, without writing. By the common law, the whole property of a chattel may be transferred by parol, accompanied by a delivery. . . . Without doubt, then, by the common law, a ship may be hired by a parol contract, so as to be binding on both parties." And in Lamb *v.* Durant, 12 Mass. 60: "Occasion for selling vessels frequently arises in the course of business; and, notwithstanding they are commonly conveyed by an instrument under seal, they may pass by delivery only, as well as any other chattel, so far as respects the property of the vessel." And see Oliver *v.* Greene, 3 Mass. 133; Bartlett *v.* Walter, 13 Mass. 137; Ogle *v.* Eagle Ins. Co., 4 Mason, 390.

ship still more to real estate. Our statutes of registration, copying the English, have always required registration before the ship becomes entitled to the privileges of an American ship.

The English statutes have gone farther, and required
* 550 registration to make the transfer valid. And quite * recently an act of Congress has required registration of all transfers by sale, mortgage, or pledge. (*c*) Moreover, it has been a universal opinion, growing out of a universal custom, that the law-merchant required that a transfer of a ship should be made by a written document. Out of all these things there has grown up an impression in this country, that title to a ship could be made only through written documents. But the law is not, we think, so. (*d*) If the question is simply, who is the owner of the ship; and not what can the owner do with her; and not whether the recent law as to sales and mortgages of ships has been complied with, — we should say, very confidently, that the sale and ownership of a ship are regulated by the rules and principles applicable to the sale of any other chattel.

Part-owners of a ship may have built it jointly, or may have purchased it jointly; or one or another may have purchased his interest from a former owner of a whole or a part. But their rights and relations are the same, whether they arise in one of these ways or in another. (*e*)

They are not partners; and the difference between the relation of partners and that of part-owners will be illustrated by whatever we have to say of these last. But, although part-

(*c*) See 1 Parsons on Shipping and Admiralty, ch. 2, where the English and American Registry acts, and the various questions adjudicated under them, are considered. And see Hughes *v.* Morris, 21 L. J. Ch. 761; McCalmont *v.* Rankin, 8 Hare, 1, 20 L. T. Ch. 1; Boyson *v.* Gibson, 4 C. B. 121; Campbell *v.* Thompson, 2 Hare, 140.

(*d*) Lamb *v.* Durant, 12 Mass. 54; Taggard *v.* Loring, 16 id. 336; Atkinson *v.* Maling, 2 T. R. 462, 466; Sutton *v.* Back, 2 Taunt. 301; Bixby *v.* Whitney, 8 Pick. 86; Vinal *v.* Burrill, 16 id. 401; Wendover *v.* Hagebroom, 7 Johns. 308; Leonard *v.* Huntington, 15 id. 298; Thorn *v.* Hicks, 7 Cow. 698. But see Rolleston *v.* Hibbert, 3 T. R. 406; The Sisters, 5 Rob. 155, per Lord Stowell; *Ex parte* Halket, 19 Ves. 474, per Lord Eldon; Weston *v.* Penniman, 1 Mason, 316, 317; Ohl *v.* Eagle Ins. Co., 4 Mason, 173; Jacobsen Sea Laws, b. 1, ch. 2, pp. 17, 21.

(*e*) Abbott on Shipping, pt. 1, ch. 1, p. 1, § 1 (5th ed.); Jacobsen Sea Laws (ed. 1818), pp. 36, 37; Doddington *v.* Hallett, 1 Ves. Sen. 497; Nicoll *v.* Mumford, 4 Johns. Ch. 522; Mumford *v.* Nicoll, 20 Johns. 611; *Ex parte* Young, 2 Ves. & B. 242, 243.

owners are not necessarily partners, they may be partners. (*f*) This means, not only that a partnership may own ships, or a ship, or a part of a ship, as a part of their joint property, but that the part * owners of a ship, who own * 551 nothing else in common, may be partners as to that ship. The strong probability in fact, and, as we think, the strong presumption of the law, would be against such partnership, because but little would be gained by mere part-owners of a ship by their becoming partners; and, as there is little need of it, so it is seldom, if ever, done. (*g*) But the presumption might be overthrown by evidence, provided it went so far as to show not merely a joint-ownership resembling that of partnership in many respects, — for that is true of all joint-ownership of ships, — but an actual and intended partnership. Then, those partners have all the rights and powers, and come under all the obligations and liabilities, heretofore stated, which belong to partners. (*h*)

A more common case is one where part-owners of a ship join in an adventure or enterprise in such a form, or way and manner, as to make them partners as to that adventure. We have seen that part-owners of ships may be partners as to her earnings while only part-owners as to the ships. (*hh*) This may happen, and still leave them part-owners of the ship as before, or the partnership in the cargo and adventure may involve and produce a partnership in the ship also; and this would be much more probable than for a partnership to exist

(*f*) Patterson *v.* Chalmers, 7 B. Mon. 497, 595; Doddington *v.* Hallett, 1 Ves. Sen.; Mumford *v.* Nicoll, 20 Johns. 611, reversing Nicoll *v.* Mumford, 4 Johns. Ch. 522; Macy *v.* De Wolf, 3 Woodb. & M. 193; Hewitt *v.* Sturdevant, 4 B. Mon. 453; Hinton *v.* Law, 10 Mo. 701; Gardner *v.* Cleveland, 9 Pick. 334. See Merritt *v.* Walsh, 32 N. Y. 685.

(*g*) Patterson *v.* Chalmers, 7 B. Mon. 595; Watson on Part. 5, 6; Ersk. Inst. b. 3, tit. 3, § 18; 2 Bell Comm. 655 (5th ed.); Porter *v.* McClure, 15 Wend. 187; Harding *v.* Foxcroft, 6 Greenl. 77; Thorndike *v.* De Wolf, 6 Pick. 120; French *v.* Price, 24 id. 13, 18, 19; Lamb *v.* Durant, 12 Mass. 56; Knox *v.* Campbell, 1 Barr (Penn.), 366; Atkinson *v.* Foster, 1 Man., Gr. & S. 714; Jackson *v.* Robinson, 3 Mason, 138. [Though a ship, like any other property, may be a part of partnership stock, ownership in common does not make the owners partners, even though there be a *pro rata* division of freight and earnings. Ward *v.* Bodeman, 1 Mo. Ap. 272.]

(*h*) Holderness *v.* Shackels, 8 B. & C. 612, 618; King *v.* Lowry, 20 Barb. 532; Hardy *v.* Sproule, 29 Me. 258. And see next page, note (*k*).

(*hh*) See *ante*, p. * 569.

in the ship alone. (*i*) The question whether part-owners of ships were partners under such circumstances has arisen in many cases, and presented much difficulty; but it was a difficulty rather of fact, or of the application of known rules and principles to the facts, than as to the rules themselves. They are the same as have been already stated; and when, under these rules, it is found that the part-owners are partners, they have all the powers as to selling or disposing of the common property, or binding each other in relation to it, that other partners have over their partnership stock. (*j*) But it
* 552 may * be said, that circumstantial evidence, which would suffice to prove partnership as to all other property, might not suffice to prove it as to ships, for two reasons: one, that so many of the incidents of part-ownership of ships are quite analogous to those of partnership; and the other, — which is, indeed, derived from the first, — that there is no necessity of implying partnership to satisfy certain purposes or certain exigencies, or explain certain conduct in relation to ships, which could only so be explained in relation to other property. In other words, we shall show, as we go on, that mere tenants in common of ordinary chattels do not possess certain powers and rights, unless they enter into partnership; but that part-owners of ships do possess some of these powers and rights (but certainly not all) while they remain part-owners only. Or, to repeat the same thing, in yet other words, part-ownership of ships is something between mere tenancy in common and partnership. (*k*)

(*i*) Doddington *v.* Hallett, 1 Ves. Sen. 497; Mumford *v.* Nicoll, 20 Johns. 611; Macy *v.* De Wolf, 3 Woodb. & M. 193; Hewitt *v.* Sturdevant, 4 B. Mon. 453; Hinton *v.* Law, 10 Mo. 701; Gardner *v.* Cleveland, 9 Pick. 334. And see Helme *v.* Smith, 7 Bing. 709; *Ex parte* Young, 2 Rose, 78, note; Green *v.* Briggs, 6 Hare, 595.

(*j*) Wright *v.* Hunter, 1 East, 20; Harding *v.* Foxcroft, 6 Greenl. 76; Phillips *v.* Purington, 15 Me. 425; Patterson *v.* Chalmers, 7 B. Mon. 595; Lamb *v.* Durant, 12 Mass. 54; Seabrook *v.* Rose, 2 Hill, Ch. 555, 556. And see cases in previous note.

(*k*) See Merrill *v.* Bartlett, 6 Pick. 46; Braden *v.* Gardner, 4 id. 456; Doddington *v.* Hallett, 1 Ves. Sen. 497; *Ex parte* Young, 2 Ves. & B. 242; *Ex parte* Harrison, 2 Rose, 76; *Ex parte* Parry, 5 Ves. 575; Nicoll *v.* Mumford, 4 Johns. Ch. 522, reversed in Mumford *v.* Nicoll, 20 Johns. 611; The Larch, 2 Curtis, C. C. 427; Sterling *v.* Hanson, 1 Cal. 478; Briggs *v.* Wilkinson, 7 B. & C. 34; Jennings *v.* Griffiths, R. & M. 43; Young *v.* Brander, 8 East, 10; Frazer *v.* Marsh, 13 id. 238; Reeve *v.* Davis, 1 A. & E. 312; Frost *v.* Oliver, 22 L. J. Q. B. 353; Wilson *v.* Dickson, 2 B. & Ald. 2; Helme *v.*

It may be well to remark, in this connection, that the latest statutes and registrations, and the practice under the former acts, require the insertion in the register, not only of the names of the part-owners, but of their respective shares. But where this was not done, and there was no good evidence as to the proportion of ownership, it was and is the presumption of law, that they own equally; in this respect, following the law of partnership. (*l*)

SECTION II.

OF THE RIGHTS AND OBLIGATIONS OF PART-OWNERS OF SHIPS IN RELATION TO EACH OTHER.

1. *Of Repairs, Sale, Insurance, and the like.*

* If persons be partners in a ship, or in any part of a ship, neither of them can make any claim against the other for expenses incurred about their common property, unless upon a complete settlement of the whole partnership account. But if a part-owner makes repairs, or incurs other expense, with the consent of the other part-owners, he has an immediate claim against each of the others, for his share of the expense, at law; (*m*) and, probably, if a part only are solvent, they who * 553

Smith, 7 Bing. 715; Williams *v.* Thomas, 6 Esp. 18; Robinson *v.* Gleadow, 2 Bing. N. C. 163; Wedderburn *v.* Wedderburn, 4 Mylne & C. 41; Jaggers *v.* Binnings, 1 Stark. 64; The Jonge Tobias, 1 C. Rob. Adm. 329.

(*l*) Alexander *v.* Dowie, 1 H. & N. 152, 37 Eng. L. & Eq. 551; Glover *v.* Austin, 6 Pick. 221; Ohl *v.* Eagle Ins. Co., 4 Mason, 172; Gould *v.* Gould, 6 Wend. 263; Honore *v.* Colmesnil, 1 J. J. Marsh. 506; Farrar *v.* Beswick, 1 Moody & Rob. 527; Conwell *v.* Sandidge, 5 Dana, 211; *In re* Blanchard, 2 B. & C. 244; *Ex parte* Young, 2 Ves. & B. 242. But see the act of 1850, ch. 27, § 5, 9 U. S. Stats. at Large, 441, providing for the insertion in the register of enrolment of the part or proportion of the vessel belonging to each owner.

(*m*) Patterson *v.* Chalmers, 7 B. Mon. 595; Sawyer *v.* Freeman, 35 Me. 542; Gardner *v.* Cleveland, 9 Pick. 334; Gowan *v.* Foster, 3 B. & Ad. 507. See also, on this question, Briggs *v.* Wilkinson, 7 B. & C. 30, per Bayley, J.; Reeve *v.* Davis, 1 A. & E. 312; Jennings *v.* Griffiths, Ryan & M. 43; Young *v.* Brander, 8 East, 10; Westerdell *v.* Dale, 7 T. R. 306; Annett *v.* Carstairs, 3 Camp. 354; *Ex parte* Bland, 2 Rose, 92; Brodie *v.* Howard, 17 C. B. 109, 33 Eng. L. & Eq. 146; Revens *v.* Lewis, 2 Paine C. C. 202; King *v.* Lowry, 20 Barb. 532; Cox *v.* Reid, 1 Car. & P. 602; *Ex parte* Machell, 2 Ves. & B. 216. In Rich *v.* Coe, Cowp. 639, Lord Mansfield said: "Whoever supplies a ship with necessaries has a treble security: 1, the person of the master; 2, the specific ship; 3, the personal security of

are insolvent would not be considered in equity in determining their share or contribution. (*n*)

* 554 * What the rights of a part-owner are, if he incurs such expenses without the consent of the other owners, may not be so certain. If the repairs, or other expenses, were reasonable and expedient, and, still more, if they were distinctly necessary to the use or to the existence of the ship, their consent might be implied; and certainly would be, if it were possible. (*o*) But is there any presumption to this effect which is absolute, and incapable of rebuttal? Thus, if they had previously been requested, and distinctly refused their assent,— that is, if the facts presented precisely this issue, are the other part-owners liable for expenses certainly necessary, but which they certainly prohibited? The answer must be in the negative. (*p*) Some analogy has been supposed to exist between

the owners, whether they know of the supply or not." It must be recollected, however, that if this observation includes mere legal owners, the later decisions establish that they are not liable, unless the contract is shown to be made with their express or implied authority; and, further, that there may be cases in which the master, acting as agent for the owners, incurs no personal liability; as, for instance, where no credit is given to him, or there is an express stipulation that he shall not be personally liable. It is perfectly open to the parties to contract so as to confine the responsibility either to the master or to the owners. Maude & P. on Shipping, 35, note; Hoskins *v.* Slayton, Rep. temp. Hardw. 360; Farmer *v.* Davies, 1 T. R. 108. And see the observations of Lord Ellenborough, C. J., in Hussey *v.* Christie, 9 East, 432. To obtain an adjustment of the ship's accounts, proceedings between the part-owners may be instituted in a court of equity. Moffat *v.* Farquharson, 2 Bro. Ch. 338. And see Owston *v.* Ogle, 13 East, 538.

(*n*) 2 Pars. on Cont. 269 (5th ed.); 1 Pars. on Shipping and Admiralty, ch. 4, p. 119. But, in Merrill *v.* Bartlett, 6 Pick. 46, it was *held*, that where two persons built a ship together, to be armed by them in certain proportions, and one advanced more than his proportion of the expenses, he had no lien on the ship for the balance due to him; but the interest of the other in the ship, at least to the extent of his advances, was liable to attachment at the suit of other creditors. And see Thorndike *v.* De Wolf, 6 Pick. 120; Doddington *v.* Hallett, 1 Ves. Sen. 497; *Ex parte* Harrison, 2 Rose, 76; *Ex parte* Young, 2 Ves. & B. 242; Mumford *v.* Nicoll, 20 Johns. 611; *Ex parte* Parry, 5 Ves. 575.

(*o*) Westerdell *v.* Dale, 7 T. R. 306; Chapman *v.* Durant, 10 Mass. 47; James *v.* Bixby, 11 Mass. 34, 36; Schemerhorn *v.* Loines, 7 Johns. 311; Muldon *v.* Whitlock, 1 Cow. 290; Hardy *v.* Sproule, 29 Me. 258; Wright *v.* Hunter, 1 East, 20; Baldney *v.* Ritchie, 1 Stark. 338; Thompson *v.* Finder, 4 Car. & P. 158; Macy *v.* De Wolf, 3 Woodb. & M. 193, 204; Gallatin *v.* The Pilot, 2 Wallace C. C. 592; Scottin *v.* Stanley, 1 Dall. 129; King *v.* Lowry, 20 Barb. 532; Patterson *v.* Chalmers, 7 B. Mon. 595; Sawyer *v.* Freeman, 35 Me. 542.

(*p*) See Brodie *v.* Howard, 33 Eng. L. & Eq. 146; Hardy *v.* Sproule, 31 Me. 71; Davis *v.* Johnston, 4 Sim. 539; The Jonge Tobias, 1 C. Rob. Adm. 329.

ships and houses and mills. The owners of these last were compellable, at common law, to contribute for their repair; and a joint-tenant, or tenant in common, might have his writ "*de reparatione facienda*" against another. (*q*) The reason of this is obvious; and it might seem to be almost equally desirable to maintain ships in good repair, as houses or mills. But the answer is, we have no rule of law to this effect. In fact, at common law, while any part-owner might doubtless repair the ship at his own cost, he would have therefor no claim whatever upon the other part-owners, unless he can found it, in some way or other, upon their consent and promise, actual or constructive. (*r*)

* Whether he has such a claim in equity, if not at law, * 555 may be more doubtful; but we know of no authority for saying that he would have relief in that court, in this country. We have another court with us, which, reasoning from the analogy of such cases as a dissent about employment, and the like, we should say, possesses here, though probably not at this time in England, full power in the premises; and that is the Court of Admiralty: but that it would be open to a part-owner so circumstanced, and would find for him means of adequate and appropriate relief, we should say, if at all, rather from a general belief that our admiralty courts possess a wide and

(*q*) Carver *v.* Miller, 4 Mass. 559.

(*r*) Brodie *v.* Howard, 33 Eng. L. & Eq. 146; Curling *v.* Robertson, 7 Maen. & G. 336; Mitcheson *v.* Oliver, 19 Jur. 901; Hardy *v.* Sproule, 31 Me. 71; Benson *v.* Thompson, 27 id. 470. The distinctions are well stated by Williams, J., in Brodie *v.* Howard. "Part-owners of a ship are not in the situation of partners. To this extent they resemble partners, namely, that they are all liable for repairs and such other necessary expenses for the ship which may be presumed to have been incurred with their assent; but they differ from partners in this respect, that the authority of one part-owner to pledge the credit of the other does not exist, as in the case of partners, unless such authority has been determined only by express dissent, communicated to third parties. There is no authority that any such law is applicable to part-owners. I am of opinion, therefore, that the only question here is, whether, in point of fact, that presumption of liability, which would have arisen as part-owner, is rebutted by the circumstances; and I think that there is here ample evidence to rebut such presumption, and that there is nothing in point of law or of fact to make this defendant liable. He might have so conducted himself by previous dealings with the plaintiff as to have made himself liable in the present action; but there is no evidence of any such dealings, and there is nothing here to show that he ever held out Lewis (the other part-owner) as his agent."

very general jurisdiction over the rights and obligations of part-owners, than from the authority of recorded decisions. And if it be true, as is said emphatically in one case, that admiralty has no jurisdiction between part-owners in cases of account, and only in cases of contract, it would seem that this court could not find a remedy in the supposed case. (*s*)

Any part-owner may sell his interest or share at any time, to any person, and on any terms, at his own pleasure. (*t*) But, while he has such plenary power over his own share, he has none whatever over the shares of other owners, and can sell them only when he has an authority which would justify his selling any chattel interest of another party. (*u*)

* 556 * It has, indeed, been doubted whether, even in case of partnership between part-owners, either of them has, in this country, the right of sale of the whole ship. (*v*) But the doubt must rest only on the necessity of registered title; that is, on the same ground which prevents a partner from making a valid conveyance of land held by his firm, if the legal title is not wholly in him. But as we doubt whether a sale of a ship may not be made like that of any chattel, so do we whether there exists this restraint upon the power of sale of a partner as to the joint property in a ship. (*w*)

If a part-owner did sell the whole ship, it seems that the other part-owners might look on this as the constructive destruction of the ship, and so bring trover against the seller, as

(*s*) The Steamboat Orleans *v.* Phœbus, 11 Pet. 175. And see *post*, p. * 561, note (*u*).

(*t*) Molloy, De Jur. Mar. 222; 1 Pars. on Shipping and Admiralty, 92. And see Oviatt *v.* Sage, 7 Conn. 95. As to the liability of the assignee of the share of a part-owner, see Douglas *v.* Russell, 4 Sim. 533.

(*u*) Weld *v.* Oliver, 21 Pick. 559; White *v.* Osborn, 21 Wend. 72; Hyde *v.* Stone, 9 Cow. 230, 7 Wend. 354; Oviatt *v.* Sage, 7 Conn. 95; Wilson *v.* Reed, 3 Johns. 175; Thompson *v.* Cook, 2 Southard, 580; Farr *v.* Smith, 9 Wend. 338; Barton *v.* Williams, 5 B. & Ald. 395; Farrar *v.* Beswick, 1 M. & W. 682, per Parke, B.; Mayhew *v.* Herrick, 7 C. B. 229.

(*v*) Where the members of a trading partnership are interested in a ship, the names of all the partners should appear on the ship's register; and a ship belonging to a partnership having been registered as belonging to two partners carrying on trade under a particular firm, it was *held*, that a third partner, who formed one of the firm, but whose name was not on the register, had no interest in the ship. Slater *v.* Willis, 1 Beav. 361. See also, Curtis *v.* Perry, 6 Ves. 739; Battersby *v.* Smyth, 3 Madd. 110; Thompson *v.* Leake, 1 id. 39; The Frances, 2 Dods. 423.

(*w*) Lamb *v.* Durant, 12 Mass. 54; Wright *v.* Hunter, 1 East, 20.

any tenant in common may against his cotenant for the destruction of the chattel. (*x*) On the same ground, the other owners may have trover against the purchaser of a ship, if he also sells it. (*y*) But, at common law, no part-owner can wrest the possession of the ship from the hands of another, or have trover or replevin; (*z*) and for all purposes of this kind he must go into admiralty, as we shall see when speaking of the employment of the ship.

As a part-owner cannot sell the whole ship, so neither can he transfer the property in the whole by way of mortgage or * pledge. (*a*) But, if we are right in supposing that * 557 a valid sale of a ship may be made informally, as by oral bargain and delivery, it would follow that a sale or mortgage made in this way without consent of the other owners, and therefore void as to their interests, might be informally ratified by them, and would be made entirely effectual by any words or conduct of theirs which amounted to ratification. (*b*) The recent statute of the United States regulating transfers of ships by sale or mortgage, would, however, apply to this.

A part-owner cannot recover damages against another, for fraudulently and deceitfully sending a ship on a foreign voyage, and thereby causing her loss; nor has he a remedy (*c*) for this, even in equity; nor for careless and negligent mismanagement, whereby the ship was destroyed by fire. (*d*)

(*x*) Chesley *v.* Thompson, 3 N. H. 9; Herrin *v.* Eaton, 13 Me. 193; Maddox *v.* Goddard, 15 id. 218; Anders *v.* Meredith, 4 Dev. & B. 199; Barnadiston *v.* Chapman, 4 East, 121; Gilbert *v.* Dickerson, 7 Wend. 450.

(*y*) Weld *v.* Oliver, 21 Pick. 559; White *v.* Osborn, 21 Wend. 72; Hyde *v.* Stone, 9 Cow. 230, 7 Wend. 354; Wilson *v.* Reed, 3 Johns. 175; Thompson *v.* Cook, 2 Southard, 588; Farr *v.* Smith, 9 Wend. 338. See further, on this question, Barton *v.* Williams, 5 B. & Ald. 395; Farrar *v.* Beswick, 1 M. & W. 688, per Parke, B.; Heath *v.* Hubbard, 4 East, 110; Mayhew *v.* Herrick, 7 C. B. 229; Barnadiston *v.* Chapman, C. B. 1 Geo. 1, before King, C. J., cited 4 East, 121; Graves *v.* Sawcer, 1 Levinz, 29 T. Raym. 15.

(*z*) Fennings *v.* Ld. Grenville, 1 Taunt. 241; Seldon *v.* Hickock, 2 Caines, 166; Heath *v.* Hubbard, 4 East, 110; Mayhew *v.* Herrick, 7 C. B. 229; Merserean *v.* Norton, 15 Johns. 179; Hyde *v.* Stone, 9 Cow. 230; Hurd *v.* Darling, 14 Vt. 214; Wetherell *v.* Spencer, 3 Gibbs (Mich.), 123; Farr *v.* Smith, 9 Wend. 338; Barnes *v.* Bartlett, 15 Pick. 71.

(*a*) But a partner may do so. Patch *v.* Wheatland, 8 Allen, 102.

(*b*) Hagedorn *v.* Oliverson, 2 Maule & S. 485; Routh *v.* Thompson, 13 East, 274; Oviatt *v.* Sage, 7 Conn. 95; Putnam *v.* Wise, 1 Hill, 234.

(*c*) Graves *v.* Sawcer, T. Raym. 15, 1 Keb. 38, 1 Lev. 29; Strelly *v.* Winson, 1 Vern. 297, Skin. 230. See Horn *v.* Gilpin, Amb. 255.

(*d*) Moody *v.* Buck, 1 Sandf. 304.

It is now quite well settled, that a part-owner has no authority to insure the interests of the other part-owners, for them, without their authority. And this is true even if he be ship's husband, (*e*) (of whose general powers and duties we shall speak hereafter). And by the law of agency in reference to contracts of insurance, this authority, if not absolutely express, must be very nearly so. It is true, that an authority to insure may be inferred from circumstances; but they must be very strong. (*f*) And there is no reason, that we are aware of, for holding that the authority may be less fully and distinctly made out in the case of a part-owner than in that of a mere stranger. The relation between part-owners affords for such authority only a very slight foundation, and would assist but little in the circumstantial proof of that authority.

As a part-owner may sell or transfer his whole interest, at his own pleasure, so it may be taken from him by a creditor, and passes by death or by bankruptcy to his representa-
* 558 tives. And in * either of these ways, or by the destruction of the ship, the relation of part-ownership is dissolved. There may remain, however, in the managing owner or owners, somewhat of the same power and duty of winding up the concern, which belongs to the survivors or solvent partners of a partnership. (*g*)

2. *Of the Employment of the Ship.*

The law on this subject has advanced somewhat farther than it has in relation to repairs. The reasons are the same, and seem to be equally strong; and it may be thought that they

(*e*) See *post*, p. * 570, note (*d*). And see Peoria M. & F. Ins. Co. *v.* Hall, 12 Mich. 202.

(*f*) See Hagedorn *v.* Oliverson, 2 Maule & S. 485; Routh *v.* Thompson, 13 East, 274; Hooper *v.* Lusby, 4 Camp. 66; Robinson *v.* Gleadow, 2 Bing. N. C. 156. [A part-owner of a vessel, in whose name a policy of insurance on the whole vessel for account of the owners is issued, is a trustee for the other owners, and, in case of loss, may sue on the policy in his own name. But he has no authority, by reason of the joint ownership, to insure the interests of the other part-owners; and such insurance, unless sanctioned, will cover only his individual interest. If sanctioned by them, it will cover the interests of all. Knight *v.* Eureka Fire & Mar. Ins. Co., 26 Ohio St. 664.]

(*g*) As to the rules of the maritime law, see Molloy, b. 2, ch. I, § 3, Maude & P. on Shipp. 45.

will reach, in reference to repairs, the same result to which they have arrived in reference to the employment of the ship; but they have not yet.

If part-owners agree, they may make what use of the ship they will, or no use at all. The law does not interfere with them in the slightest degree. But, if they differ, — either because a part wish one use, and others another; or because some wish to employ her, and others to let her rest, — the law now interferes, and determines what shall be done with her.

Courts of common law cannot do this; (*h*) and it is now settled, we suppose, in England, as well as in this country, that courts of equity either cannot or will not. (*i*) The question, therefore, must come before courts of admiralty. They have much power in England, in the premises. (*j*) In this country, they have far * more. (*k*) And since a de- * 559 cision of the Supreme Court of the United States has extended admiralty jurisdiction over all our interior waters, (*l*) it may be believed that its prompt, equitable, and always adequate remedies, will be sought in nearly all the ques-

(*h*) Where, however, one of the part-owners, who acted as ship's husband, covenanted with the others to make out the ship's accounts, and divide the profits after the ship's return, it was *held*, that the other owners might sue him at law on this covenant. Owston *v.* Ogle, 13 East, 538.

(*i*) See as to the jurisdiction of equity in case of part-owners, Crapster *v.* Griffith, 2 Bland, 5; Milburn *v.* Guyther, 8 Gill, 92; Brenan *v.* Preston, 2 De Gex, M. & G. 813; 10 Hare, 331; Haly *v.* Goodson, 2 Meriv. 77; Christie *v.* Craig, id. 137; Castelli *v.* Cook, 7 Hare, 89. The jurisdiction of the court of chancery is undoubted, wherever there is an express agreement as to the employment of the ship. Darby *v.* Baines, 9 Hare, 369. See also Brenan *v.* Preston, 2 De Gex, M. & G. 813; Adams's Eq. 526, n., as to the restraining powers of courts of equity where there is difficulty in the relief in admiralty. Equity has jurisdiction in matters of account between the part-owners of a ship. Moffat *v.* Farquharson, 2 Brown Ch. 338; Good *v.* Blewitt, 13 Ves. 397.

(*j*) Maude & P. on Shipp. 47; Molloy, b. 2, ch. 1, § 2; Beawes, 107; *In re* Blanshard, 2 B. & C. 248. But see The Apollo, 1 Hagg. 306, in which Lord Stowell said, that "a copartner in a ship could not originate in the court of admiralty a suit for accounts; nor will it hang jurisdiction on such accounts upon a stipulation taken in a case between part-owners." But see The Sisters, 4 Rob. 275; The New Draper, id. 287; The Experiment, 2 Dodson, 38; The John, of London, 1 Hagg. 342; The Pitt, id. 240; The Margaret, 2 id. 276, 277.

(*k*) See The Vincennes, decided by Mr. Justice Ware, in 1851, cited 2 Pars. on Cont. (5th ed.) 267, and 2 Pars. on Shipping & Admiralty, 343, 426; Davis *v.* Brig Seneca, 18 Am. Jur. 486, Gilpin, 10; Skrine *v.* Sloop Hope, Bee, 2.

(*l*) Steamboat Orleans *v.* Phœbus, 11 Pet. 175.

tions which arise under the law of shipping. We cannot give here even an outline of the principles or practice of this jurisdiction. But, in reference to our immediate topic, remark, at the outset, that the court always asks what the majority desire. (*m*) It might even seem, from the English authorities, that whatever the majority agree in desiring, that the courts of admiralty will do, only protecting the interests of the minority. (*n*) But even there the rule would require some qualification. The foundation of the whole jurisdiction in relation to the employment of the ship, is, that public policy requires the use of the ship, rather than that she should decay at the wharf. Hence, if all the owners agree to use her in any way, the law never interferes ; and, if a majority agree to use her in any way, the court would permit that use, only requiring that they should give to the minority adequate security for the return of the ship.

This is, undoubtedly, the general rule both in England
* 560 and here. (*o*) But, if it were understood to be a * universal and peremptory rule, it might give rise to much oppression. Suppose a majority wished not to employ the ship at all ; if the court would then permit the minority to direct the employment, they giving security, might not the majority accomplish their purpose by agreeing upon some preposterous and wasteful voyage, such that the minority, if obliged to choose between that voyage and none, would prefer none ? Or, we may suppose an actual majority, or one large owner, who, by nominally transferring small interests, had made an apparent majority, desiring a voyage unprofitable or dangerous to the

(*m*) The John, of London, 1 Hagg. 342, 346; The Pitt, id. 240; *In re* Blanshard, 2 B. & C. 248; The Apollo, 1 Hagg. 306; Haly *v.* Goodson, 2 Meriv. 77; Willings *v.* Blight, 2 Pet. Adm. 288; Steamboat Orleans *v.* Phœbus, 11 Pet. S. C. 175.

(*n*) Adams's Eq. 526; Card *v.* Hope, 2 B. & C. 661.

(*o*) See last note. And see Gould *v.* Stanton, 16 Conn. 12; Willings *v.* Blight, 2 Pet. Adm. 288; The Marengo, Sprague, 506; The Apollo, 1 Hagg. 306; Fox *v.* The Lodemia, Crabbe, 271; The Steamboat Orleans *v.* Phœbus, 11 Pet. 175; *In re* Blanshard, 2 B. & C. 244, 248, 249; Strelly *v.* Winson, 1 Vern. 297; Anonymous, 2 Cas. Ch. 36; Buddington *v.* Stewart, 14 Conn. 404; Haly *v.* Goodson, 2 Meriv. 77. The majority in such case control the appointment and dismissal of the officers and crew of the ship; and the dissentient owners bear no part of the expense, and are entitled to no part of the profit of the voyage to which they have disagreed. Gould *v.* Stanton, 16 Conn. 12; Davis *v.* Johnson, 4 Sim. 539; The Apollo, 1 Hagg. 306; Card *v.* Hope, 2 B. & C. 661, 675.

ship, either from mere folly or for some collateral advantage: here the court would not regard the wishes of a majority. Practically, the rule in our courts may be said to be, that they will direct such employment of every ship as shall seem to be most advantageous for all concerned; being, in all cases, greatly influenced by the wishes of a majority, but not absolutely bound by them.

They who prevail, and thus get control of the ship, must give security to those who are defeated; and this security might be given either for the share of the profits of the voyage contemplated which would have come to the defeated owners if they had entered into the voyage, or for some compensation for the use of the vessel by the prevailing owners. But a recent decision would seem to limit the action of the court to requiring of the majority, who take possession of the ship, security for her safe return, with no compensation to the other owners for the use of the ship. (*q*) She is virtually insured for the minority, by the security given for her safe return. We know no case in which the security required extends expressly to repairs; but perhaps this also is included, to some extent, in her *safe* return; and, if circumstances distinctly called for specific security on this point, the court might, perhaps, require it. (*r*)

If there is no majority, the English admiralty would not select from the two antagonist desires that which is thought the best. (*s*) * And it seems now to be settled, * 561 that they would not decree a sale. (*t*) In this country,

(*q*) The case of The Marengo, 1 Amer. Law Review, p. 88, decided by Judge Lowell, Dist. Court U. S. for Massachusetts, April, 1866.

(*r*) See, for the general principles which have regulated the action of admiralty on this subject, 2 Pars. on Shipping & Admiralty, ch. 7, sect. 1, and the cases cited in the notes on the next page.

(*s*) See The New Draper, 4 Rob. Adm. 287; The Egyptienne, 1 Hagg. Adm. 346; The Elizabeth and Jane, 1 W. Rob. 278; The Valiant, id. 64, 67; The Windsor Castle, 1 Notes of Cases, 118. See Adams's Eq. 526; Smith's Merc. Law, 174; Davis *v.* Johnston, 4 Sim. 539.

(*t*) Adams's Eq. 526; Ouston *v.* Hebden, 1 Wils. 101; The Apollo, 1 Hagg. 306; The Margaret, 2 id. 276, per Sir C. Robinson: "The law of some countries has gone so far as to endeavor to compromise all interests, by compelling, in cases of disagreement, a sale, either of the shares of the minority or of the whole ship, at the application of a majority of the owners, and sometimes even of a moiety of interests. Such attempts appear to have been made also in this country; but the justice of such a proceeding may be questionable. Disagreements may be fomented by it, or a forced sale, at particular times, may

the decided weight of authority, and, as we think, of reason, is in favor of the power of admiralty to decree a sale. (*u*) We have no doubt that the court would do this, rather than have the vessel lost by disuse; and in most cases, perhaps in all, they would do this rather than select between two proposed courses, neither of which was desired by a majority. But if the majority would make no use of the ship, and the minority a reasonable use, it seems that the minority may have the ship, giving bonds, &c., as before. (*v*)

Quite frequently in this country, — much more so than in England, — the master of a ship is a part-owner. And this circumstance affects somewhat the otherwise unqualified
* 562 power of the owners, *to appoint, displace, or direct the persons employed by them. If all the owners agree in this, nothing limits their power. If they do not agree, a majority have great power, but would not be permitted to oppress a minority. If this minority consisted of the master, whom all the other owners wished to displace, he would have a hearing in court, and the other owners must show some reason for displacing him. We should suppose that, if there were two equal owners, and one were master, he might be displaced at the suit

be disadvantageous or ruinous to the minority. The law of England has accordingly restrained the Court of Admiralty from exercising such an authority, and no other court has assumed it. On the contrary, the courts of common law and of chancery have declined to interfere between joint tenants in respect to the possession of their ship."

(*u*) Brooks & Davis *v.* The Seneca, 18 Am. Jur. 486, 490, per Mr. Justice Washington, reversing s. c. Gilpin, 10; Skrine *v.* The Sloop Hope, Bee's Adm. 2; Willings *v.* Blight, Pet. Adm. 288; Tunno *v.* The Betsina, 5 Am. L. Reg. 406; Steamboat Orleans *v.* Phœbus, 11 Pet. 183; Adams's Eq. 526, note 2; Maude & P. on Shipp. 48, n.; 3 Kent's Comm. 211, 213 (9th ed.); Abbott on Shipp. (6th Am. ed.) 104, n.

(*v*) Steamboat Orleans *v.* Phœbus, 11 Pet. 175, per Story, J.: "The majority of the owners have a right to employ the ship in such voyages as they may please; giving a stipulation to the dissenting owners for the safe return of the ship, if the latter, upon a proper libel filed in the admiralty, require it. And the minority of the owners may employ the ship in the like manner, if the majority decline to employ her at all. So the law is laid down in Lord Tenterden's excellent treatise on Shipping." Abbott on Shipp., part 1, ch. 3, § 4 to § 7; 3 Kent Comm. 211, n; Maude & P. on Shipp. 47, n; 2 Parsons on Shipping & Admiralty, 242, 243. If the interests of the owners be equal, and they differ about the employment of the ship, — one-half being in favor of employing her, and the other half opposed to it, — the willing owners may, upon giving the usual security, have the ship delivered to them for employment. Davis *v.* The Brig Seneca, 18 Am. Jur. 486, 490.

of the other in admiralty, or a sale ordered, but only when reasons were offered of sufficient, that is, in such a case, of very great, strength and importance. (*w*)

It has been said that part-owners, being tenants in common, cannot sue each other for injury or loss to the common property by negligence, unless this injury amounts to destruction. (*x*) We doubt, however, whether an admiralty court would always apply this technical rule. It does not seem consonant with the principles of the law-merchant; nor could it be derived from the Roman civil law; and these are the two principal sources of admiralty jurisprudence. (*y*) If a part-owner detains a ship, and prevents a voyage toward which the other owners have contributed expenses without notice of dissent from him, he is liable to them for his share. Even if he dissents, but does not distinctly object, and, the voyage being undertaken, the ship is lost, it has been said that he is still liable in equity. But not so if he expressly dissent and object. (*z*)

* It is certain that part-owners of ships are held to *563 strict honesty in their mutual dealings. Each must account for any profits received, and would be allowed in his account no credit for charges or expenses which were not reasonably necessary and free from all suspicion of ill faith.

3. *Of the Lien of Part-owners of Ships.*

This is one of the questions upon which the authorities are in irreconcilable conflict. It seems to be very generally agreed

(*w*) See the New Draper, 4 Rob. Adm. 290; The See Reuter, 1 Dods. 22. In The New Draper, Sir William Scott said: "The dispossession of a master is in its nature not an uncommon proceeding; all that the court requires in cases where the master is not an owner, is, that the majority of the proprietors should declare their disinclination to continue him in possession. In the case of a master and part-owner, something more is required before the court will proceed to dispossess a person who is also a proprietor in the vessel, and whose possession, therefore, the common law is upon general principles inclined to maintain. It is not, however, by any means unprecedented for this court to proceed even to that extent; but then some special reason is commonly stated to induce the court to interpose." In the case of a foreign ship, as a general thing the court will not interfere, on application of the part-owners, to dispossess a captain who is also an owner. The Johan and Siegmund, Edw. Adm. 242.

(*x*) See Graves *v.* Sawcer, T. Raym. 15 Lev. 29, 1 Keble, 38.

(*y*) 1 Domat's Civil Law, by Strahan, § 1489 (Cushing's ed.) p. 584.

(*z*) Anonymous, Skinner, 230; Strelly *v.* Winson, 1 Vern. 297; Horn *v.* Gilpin, Amb. 255; Davis *v.* Johnston, 4 Sim. 539.

that a part-owner who is in advance to the ship or cargo on a certain voyage or adventure, has a lien on the ship or cargo or proceeds for that specific balance. (*a*) So if part-owners agree to fit out and load a vessel jointly for a certain voyage, and one of them becomes bankrupt and fails to advance his share of the expense, it seems that this case will be settled on the principles of partnership. That is, the solvent part-owners will settle and wind up the adventure; charging the bankrupt with his share of the advance and expense, and paying to the assignees only the final balance due him. (*b*) But this might be required by the common principles of bankruptcy, which are liberal in the allowance of set-off. The true question is, whether a part-owner has a lien on the ship or its proceeds for any general balance due from the other owners. So far as this balance arises from accounts or transactions entirely independent
* 564 of the ship, he has not. (*c*) Nor has he for * a balance arising from charges for the ship itself in former voyages, unless part-ownership be deemed in this respect a kind of partnership. (*d*) We have high authority for this view. Hardwicke, sitting in equity, held it. (*e*) Afterwards, it seemed to be doubted and perhaps overthrown in England. (*f*) Story

(*a*) Holderness *v.* Shackles, 8 B. & C. 612; Gould *v.* Stanton, 16 Conn. 12, 23; Macy *v.* De Wolf, 3 Woodb. & M. 193, 210; Doddington *v.* Hallett, 1 Ves. Sen. 497; Mumford *v.* Nicoll, 20 Johns. 611, 625; Hewitt *v.* Sturdevant, 4 B. Mon. 453, 466; Gardner *v.* Cleveland, 9 Pick. 334. The same rule applies to the expenses of repairs to the hull of the ship, where such repairs are done with a view to the particular adventure in which the earnings are made, and without which that adventure could not have been undertaken; and it would seem that the circumstance that such repairs are not exhausted in the adventure does not create any exception to the rule. Green *v.* Briggs, 6 Hare, 395.

(*b*) Holderness *v.* Shackles, 8 B. & C. 612; Pearson *v.* Skelton, 1 Tyrwh. & G. 848, 1 M. & W. 504; Green *v.* Briggs, 6 Hare, 395. See also, *Ex parte* Young, 2 Rose, 78, note, 2 Ves. & B. 242; *Ex parte* Harrison, 2 Rose, 76; *Ex parte* Gribble, 3 Deac. & Ch. 339; Sims *v.* Bond. 5 B. & Ad. 389.

(*c*) Merrill *v.* Bartlett, 6 Pick. 46; Braden *v.* Gardner, 4 Pick. 456; Doddington *v.* Hallett, 1 Ves. Sen. 497; *Ex parte* Young, 2 Ves. & B. 242; *Ex parte* Harrison, 2 Rose, 76; *Ex parte* Parry, 5 Ves. 575; Mumford *v.* Nicoll, 20 Johns. 611; Thorndike *v.* De Wolf, 6 Pick. 120; Patton *v.* The Schooner Randolph, Gilpin, 457; Seabrook *v.* Rose, 2 Hill, Ch. 553; The Larch, 2 Curtis C. C. 427; Sterling *v.* Hanson, 1 Cal. 478.

(*d*) 1 Parsons on Shipping and Admiralty, 111, 114. And see cases cited in the last note.

(*e*) In Doddington *v.* Hallett, 1 Ves. Sen. 497.

(*f*) By Lord Eldon. See *Ex parte* Young, 2 Ves. & B. 242; *Ex parte* Harrison, 2 Rose, 76; Green *v.* Briggs, 6 Hare, 395. See also, Buxton *v.* Snee,

inclined to it here; and there is much in the nature of the case and in the principles of the law-merchant which would lead to this conclusion. (*g*) But we apprehend the law is not quite so. If an insolvent part-owner has the proceeds of the ship in his hands, he may certainly deduct from them whatever is due to him from a bankrupt part-owner. But if the question be whether he could charge that bankrupt's share in the ship, with his whole claim against him on the ground of a lien on their common property, we think the answer must be in the negative. (*h*) In this country, one of two part-owners who built and owned a ship together has been denied his lien on the ship for his advances towards her cost. (*i*)

SECTION III.

OF THE RIGHTS AND OBLIGATIONS OF PART-OWNERS OF SHIPS AS TO THIRD PARTIES.

1. *Of the Power of a Part-owner to Represent the Owners.*

This is not the same with that of partners, but is not without some resemblance thereto. A partner, as we have seen, has a power to represent his copartners, and bind them by his acts * or promises, to any extent, if only they are within * 565 the scope of the business and are not tainted with fraud. The power of a part-owner, certainly, is not carried so far as this. It is said, however, that a part-owner, if the others are absent and distant, has the power of making contracts for the repair and furnishing of the ship, for the other owners as well as for himself. (*j*) This rule must rest partly on public policy, which

1 Ves. Sen. 154; Brent *v.* Hay, Belt's Supp. to Ves. Sen. 85.

(*g*) See Story on Part. §§ 441, 444; Mumford *v.* Nicoll, 20 Johns. 611, reversing Nicoll *v.* Mumford, 4 Johns. Ch. 522; Hewitt *v.* Sturdevant, 4 B. Mon. 458, 459.

(*h*) Braden *v.* Gardner, 4 Pick. 456; Merrill *v.* Bartlett, 6 id. 56; Thorndike *v.* De Wolf, id. 120; Patton *v.* The Schooner Randolph, Gilpin, 457; *Ex parte* Young, 2 Ves. & B. 242; *Ex parte* Harrison, 2 Rose, 76. And, for a full examination of the cases, see Green *v.* Briggs, 6 Hare, 395; 3 Kent Comm. (9th ed.) 43; *Ex parte* Parry, 5 Ves. 575.

(*i*) Merrill *v.* Bartlett, 6 Pick. 46.

(*j*) Abbott on Shipp. 105; Wright *v.* Hunter, 1 East, 20; *Ex parte* Bland, 2 Rose, 93; Bickham *v.* Knight, 5 Scott, 629; Thompson *v.* Finden, 4 Car. & P. 158; Stewart *v.* Hall, 2 Dow P. C. 29. In the following cases, the

would not permit a vessel to lie useless and decay for want of repair, unless all the owners could be convened, or were represented by agents clothed technically with authority. In part, however, it finds its foundation in the law of agency; of that implied agency which is frequently recognized by the law. This law supposes a part-owner to have authority to protect and preserve the common property, at the common expense. But the implication and the authority go no farther than the reason. Hence, if all the partners are present and within reach, there is no such necessity; for all may be consulted by the part-owner who acts, and the third party applied to for repairs may ascertain whether they have given authority. (*k*) If, however, the owners are not known, it may be said that they are not within reach or accessible for any practical purpose. This is true if they are not known, and cannot be ascertained. (*l*) But in a home port they always can be learned from the custom-house, if the names are registered. If not registered, this is the fault of the parties. And we should say that parties supplying or repairing a ship in a home port could not look on those whose names were registered, and who resided there, as distant in this sense; but that the law would regard
* 566 owners whose names were * neither known to them nor registered, as not accessible by them. (*m*)

The liability of other owners very frequently depends upon the question to whom credit was given. If exclusively to the owner dealing with the party, of course no others are holden. (*n*)

repairs were ordered by the ship's husband, and the other partners were *held* liable: Chapman *v.* Durant, 10 Mass. 47; Schemerhorn *v.* Loines, 7 Johns. 311; Muldon *v.* Whitlock, 1 Cow. 290; Thompson *v.* Finden, 4 Car. & P. 158. See also Hardy *v.* Sproule, 29 Me. 258; Scotlin *v.* Stanley, 1 Dallas, 129; Patterson *v.* Chalmers, 7 B. Mon. 595.

(*k*) Benson *v.* Thompson, 27 Me. 470; Hardy *v.* Sproule, 31 id. 71. In Mitcheson *v.* Oliver, 5 Ellis & B. 419, 32 Eng. L. & Eq. 219, 236, the question arose whether a master had authority in a home port to make repairs, and was considered by the court an open question.

(*l*) Thompson *v.* Davenport, 9 B. & C. 78. But see Thompson *v.* Finden, 4 Car. & P. 158. See also James *v.* Bixby, 11 Mass. 34; Leonard *v.* Huntington, 15 Johns. 298; Marquand *v.* Webb, 16 Johns. 89; Muldon *v.* Whitlock, 1 Cow. 290; Wilkins *v.* Reed, 6 Greenl. 220; Paterson *v.* Gandasequi, 15 East, 62.

(*m*) See Jennings *v.* Griffiths, Ryan & Moody N. P. 42, per Abbott, C. J.

(*n*) Hussey *v.* Allen, 6 Mass. 163; James *v.* Bixby, 11 id. 34; Muldon *v.* Whitlock, 1 Cow. 290; *Ex parte* Bland, 2 Rose, 91; Stewart *v.* Hall, 2 Dow, 29; Cox *v.* Reid, 1 Car. & P. 602; Reed *v.* White, 5 Esp. 122. But Parke, B., in Mitcheson *v.* Oliver, 5

And we apprehend, that, where a party makes his charges against one part-owner alone, this would raise a strong presumption that he credited him alone. (*o*) But the presumption arising from this charge, or from dealing and accounting with him alone, or receiving money from him, would be open to rebutter. If he could show that there were other owners, that he did not know them, and the owner dealing with him had their authority, actual or constructive, he would hold them. (*p*) If, as is very common, the charge is made to "ship —— and owners," this would be conclusive as to the intention. (*q*) If the creditor received payment from the owner dealing with him, in his negotiable notes or bills, *this would raise a strong *567 presumption, perhaps of a personal and exclusive dealing with him; and, if the paper were dishonored, it might be said, on this ground, that he could not look to the other owners; but the leading authorities, and, as it seems to us, the reason of the case, would lead to the opposite conclusion. (*r*) In

Ellis & B. 419, 32 Eng. L. & Eq. 219, 232, says: "We have often said the expression, 'Upon whose credit the work was done, or the goods were supplied,' is an incorrect expression, and likely to mislead the jury; the correct mode of leaving the question to the jury is, 'Who was the contracting party?'" See also, Myers *v.* Willis, 17 C. B. 77, 33 Eng. L. & Eq. 204, affirmed 18 C. B. 886, 36 Eng. L. & Eq. 350; Brodie *v.* Howard, 17 C. B. 109, 33 Eng. L. & Eq. 146; Mackenzie *v.* Pooley, 11 Exch. 638, 34 Eng. L. & Eq. 486.

(*o*) See *Ex parte* Bland, 2 Rose, 91; Baldney *v.* Ritchie, 1 Stark. 338; Stewart *v.* Hall, 2 Dow, 29; Thompson *v.* Finden, 4 Car. & P. 158; Hussey *v.* Allen, 6 Mass. 163; James *v.* Bixby, 11 id. 34; Muldon *v.* Whitlock, 1 Cow. 290; Cox *v.* Reid, 1 Car. & P. 602; Reed *v.* White, 5 Esp. 122; Chapman *v.* Durant, 10 Mass. 47; Schemerhorn *v.* Loines, 7 Johns. 311; Wyatt *v.* Marquis of Hertford, 3 East, 147.

(*p*) Thompson *v.* Davenport, 9 B. & C. 78; Taber *v.* Cannon, 8 Metc. 456. It will not discharge the owners merely to charge the debt to the master, or ship's husband, or other agent. Teed *v.* Baring, cited Abbott on Shipp. (5th ed.) pp. 83, 84; *Ex parte* Bland, 2 Rose, 91; Stewart *v.* Hall, 2 Dow, 29; James *v.* Bixby, 11 Mass. 34; Leonard *v.* Harrington, 15 Johns. 298; Marquand *v.* Webb, 16 id. 89; Thompson *v.* Finden, 4 Car. & P. 158. If a credit has been given to an agent, as a ship's husband, and the agent has been thereby enabled to settle with his principal, and to receive advances upon the faith of an exclusive liability of the agent, the owners will be discharged. Reed *v.* White, 5 Esp. 122; Wyatt *v.* Marquis of Hertford, 3 East, 147; Cheever *v.* Smith, 15 Johns. 276; Muldon *v.* Whitlock, 1 Cow. 290; Stewart *v.* Hall, 2 Dow, 29.

(*q*) Jones *v.* Blum, 2 Rich. Law, 475; Miln *v.* Spinola, 4 Hill, 177; Scottin *v.* Stanley, 1 Dall. 129; Henderson *v.* Mayhew, 2 Gill, 393.

(*r*) In a *nisi prius* case, Reed *v.* White and others, 5 Esp. 122, — which was an action for cordage sold, against the defendants, as owners of a ship, — the defendant, White, was the managing owner, whose bill, taken by the plaintiff for the cordage, was dishon-

the States where negotiable paper is *primâ facie* payment (Massachusetts and Maine), this presumption would be still stronger. (*s*) But everywhere it would be overcome by proof that there was no intention to charge him alone, and not to charge other part-owners; and this proof might be in this case, also, indirect and circumstantial. (*t*) Where a
* 568 part-owner actually dissented from any act * or contract of another owner, of course he would not be bound by such act or contract. (*u*)

There is another limitation to the implied authority of a part-owner, derivable from reason and authority. It is, that he

ored; renewed, and again dishonored. Lord Ellenborough, in charging the jury, said: "If the plaintiff, dealing with White separately, has adopted him, he has discharged the others, and must have a verdict against him. It was not necessary that there should have been a receipt. If he has adjusted accounts with him on that footing, the other defendants are entitled to the benefit of it. The first renewed bill is expressed to be for cordage found for the Princess Mary, and drawn only on White. If this was drawn on him, as for himself and as agent for his partners, it was a prolongation of time as to all. The question is, Whether it was intended as a settlement with him alone, and adopting him as the single debtor?" A very respectable full special jury of merchants found for the defendants. An important element, however, in this case, and which brings it in harmony with the other cases cited *ante*, notes (*o*) and (*p*), is that urged for the defendants, that the plaintiff had discharged the other owners, because that they, ignorant of the mode of dealing between the plaintiff and White, had suffered him to receive large sums of the East India Company for freight, which they would otherwise have detained. But see, on the main question, Higgins *v.* Packard, 2 Hall (N. Y.), 547; Schemerhorn *v.* Loines, 7 Johns. 311; Muldon *v.* Whitlock, 1 Cowen, 290, 303; Cheever *v.* Smith, 15 Johns. 276; King *v.* Lowry, 20 Barb. 532; Patterson *v.* Chalmers, 7 B. Mon. 595; Wyatt *v.* The Marquis of Hertford, 3 East, 147. See Rayburn *v.* Day, 27 Ill. 46.

(*s*) Chapman *v.* Durant, 10 Mass. 47; French *v.* Price, 24 Pick. 13, 20; Wilkins *v.* Reed, 6 Greenl. 220; Descadillas *v.* Harris, 8 id. 298; Newell *v.* Hussey, 18 Me. 249; Thacher *v.* Dinsmore, 5 Mass. 299; Maneely *v.* M'Gee, 6 id. 143; Goodenow *v.* Tyler, 7 id. 36; Whitcomb *v.* Williams, 4 Pick. 228; Reed *v.* Upton, 10 id. 522; Watkins *v.* Hill, 8 id. 522; Wood *v.* Bodwell, 12 id. 268; Ilsley *v.* Jewett, 2 Metc. 168; Butts *v.* Dean, id. 76; Curtis *v.* Hubbard, 9 id. 322, 328; Thurston *v.* Blanchard, 22 Pick. 18; Melledge *v.* Boston Iron Co., 5 Cush. 158; Varner *v.* Nobleborough, 2 Greenl. 121; Bangor *v.* Warren, 34 Me. 324; Fowler *v.* Ludwig, id. 455; Shumway *v.* Reed, id. 560; Gilmore *v.* Bussey, 3 Fairf. 418; Comstock *v.* Smith, 23 Me. 202.

(*t*) See 2 Parsons on Con. (5th ed.) 624; Butts *v.* Dean, 2 Metc. 76; Curtis *v.* Hubbard, 9 id. 328; Thurston *v.* Blanchard, 22 Pick. 18; Melledge *v.* Boston Iron Co., 5 Cush. 158; Wilkins *v.* Reed, 6 Greenl. 220. And see Teed *v.* Baring, Abbott on Shipp. (6th Am. ed.) 116; *Ex parte* Bland, 2 Rose, 91; Fitch *v.* Sutton, 5 East, 230; Wright *v.* Hunter, 1 id. 20.

(*u*) Horn *v.* Gilpin, Ambler, 255.

cannot bind the other owners by any act, or to any expenditure, which does not rest on some necessity or obvious and certain expediency. If the supplies are extravagant and wholly unnecessary, or if the expenses were wanton and excessive, the other owners would not be bound by any thing less than their express authority or assent. It is not, however, a strict necessity which is required to raise this implication; but only such reasonableness of expenditure as carries with it a probability that reasonable men would concur in or approve of it in relation to their own property. (*v*)

In some of our States, laws have been passed — and, as experience showed objections, they have been met by acts in amendment — authorizing actions to be brought by a vessel or against a vessel, in the name of the vessel, in the same manner as if it were a corporation, or a legal person. We have not yet sufficient adjudication under these statutes to understand fully their operation; but they are obviously intended to meet those cases in which injustice might be done or suffered through an ignorance of the owners' names, or by reason of their absence. (*w*) And these laws have been held by the Supreme Court of the United States to be unconstitutional, in that the right to bring an action *in rem* against a ship is exclusively an admiralty right, and therefore confined by the Constitution to the courts of the United States. (*ww*)

For the same reason, a rule of the maritime law, which has come down from a remote antiquity, gives to "material-men," as they are called, — meaning thereby men who repair a foreign ship or furnish her with supplies, — a lien against the ship itself, for the amount due for such repairs or supplies; and in this respect our States are foreign to each other. (*x*)

(*v*) Webster *v.* Seekamp, 4 B. & Ald. 352; The Vililia, 1 Wm. Rob. 1, 10; The Sophie, id. 368; Mackintosh *v.* Mitcheson, 4 Exch. 175; The Ship Fortitude, 3 Sumn. 228, 233; United Ins. Co. *v.* Scott, 1 Johns. 106, 111; Pratt *v.* Tunno, 2 Brev. 449; Wainwright *v.* Crawford, 3 Yeates, 131, 4 Dall. 225; Merwin *v.* Shailer, 16 Conn. 489; Philips *v.* Ledley, 1 Wash. C. C. 226; Beldon *v.* Campbell, 6 Exch. 886, 6 Eng. L. & Eq. 473; Leddo *v.* Hughes, 15 Ill. 41.

(*w*) See Merrick *v.* Avery, 14 Ark. 370. And see 1 Parsons on Shipping and Admiralty, 119–124, for a full examination of these statutes and the questions adjudicated under them.

(*ww*) The Hine *v.* Trevor, 4 Wall. 555.

(*x*) See the next note.

The statutes of many of our States extend this lien to ships in their home ports. (*y*)

2. *Of the Ship's Husband.*

* 569 *It has always been common for the owners of ships to agree upon some one who should be their general agent, and, as such, have the management and control of the ship. He has been called, from ancient times, "ship's husband." In our national statutes, he is called "the managing owner." Usually, and almost always in practice, he is an owner; but this is not strictly necessary, unless so far as the statutes require it. His duties and his powers, when not determined by express instructions or agreements, are such as the nature of his agency and the long usage of merchants point out. (*z*) If he be not a part-owner, all who are, are responsible to him *in solido* for his charges, within the scope of his authority, on the general principles of agency. If he be a part-owner, then it seems that each owner is liable to him only for his share. (*a*) But, perhaps, in equity, or in admiralty, solvent part-owners would share the loss arising from the bankruptcy of one of them, and his consequent indebtedness to

(*y*) The Jerusalem, 2 Gallis. 345; The Brig President, 4 Wash. C. C. 453; The Gen'l Smith, 4 Wheat. 438; The Schooner Marion, 1 Story, 68; Peyroux *v.* Howard, 7 Pet. 324; The St. Jago de Cuba, 9 Wheat. 409; Musson *v.* Fales, 16 Mass. 332. For the purposes of the lien, as in the general application of the law-merchant, our States are considered as foreign to each other. Pratt *v.* Reed, 19 How. 359; The Brig Nestor, 1 Sumn. 73; The General Smith, 4 Wheat. 438. In England the rule, differing from the American rule, is, that the lien continues only so long as the "material-man" retains the possession, as in the general law. Hoare *v.* Clement, 2 Show. 338; Justin *v.* Ballam, 1 Salk. 34; *Ex parte* Bland, 2 Rose, 91; Franklin *v.* Hosier, 4 B. & Ald. 341; Buxton *v.* Snee, 1 Ves. Sen. 154; Watkinson *v.* Bernadiston, 2 P. Wms. 367. For the Scotch law, see Wood *v.* Creditors of Weir, 1 Bell's Comm. 527.

(*z*) 1 Bell's Comm. (4th ed.) 410, § 428; id. p. 504 (5th ed.); Sims *v.* Brittain, 4 B. & Ad. 538; Benson *v.* Heathorn, 1 Younge & C. 326; Turner *v.* Burrows, 8 Wend. 144, 151; Gould *v.* Stanton, 16 Conn. 12, 23. Where the ship is under the management of the master, and the owners divide the profits, the master is, with respect to her concerns, *primâ facie* agent for them all. Briggs *v.* Wilkinson, 7 B. & C. 34; Jennings *v.* Griffiths, Russ. & M. 43; Young *v.* Brander, 8 East, 10; Frazer *v.* Marsh, 13 id. 238; Reeve *v.* Davis, 1 Adol. & E. 312; Frost *v.* Oliver, 22 L. J. Q. B. 353.

(*a*) Helme *v.* Smith, 7 Bing. 709. See also, Brown *v.* Tapscott, 6 M. & W. 119.

the ship's husband, agreeably to the rule in equity in cases of contribution. (*b*)

A ship's husband should collect, with proper promptitude, the *amount due to him from each part-owner, *570
and may sue one who refuses or neglects to pay his share. And we should say that he had a lien, for all his actual expenses for the ship, and for indemnity upon all his lawful obligations for the ship, on the proceeds of the ship, if sold; or on her earnings, or on her documents of title, if these, or any of them, come into his actual possession. But even this lien seems to be his rather as a part-owner than as *only* a ship's husband. And it does not seem to extend to the ship itself. (*c*)

His appointment may be inferred from his acting as ship's husband with the knowledge and consent, or knowledge and silence, of the other owners. It does not seem to be usually in writing. It is his duty to see to the complete equipment and entire sea-worthiness of the ship; and, therefore, to have the charge of her in port, to make all proper repairs, to furnish her with proper supplies, and see that she has all proper documents, and to ship and provide for her crew. He may appoint her master and officers; but, on this point, it is usual and proper to consult expressly the other owners. He makes the contracts for freight, and may make a bargain for a charter of the vessel; but here, also, all the owners generally act, and would sign the charter-party. He cannot insure; (*d*) nor give up their lien of the ship on the cargo for the freight; nor buy a cargo; nor borrow money; nor delegate his authority; nor, perhaps, begin and prosecute an action at law, without express authority. (*e*)

(*b*) Cowell *v.* Edwards, 2 Bos. & P. 268; McKenna *v.* George, 2 Rich. Eq. 15. This rule has been applied by courts of law, as in Mills *v.* Hyde, 19 Vt. 59, and in Henderson *v.* McDuffie, 5 N. H. 38.

(*c*) The lien of a ship's husband has been frequently considered, and is not yet quite determined. See 1 Pars. on Shipping and Admiralty, 113; 2 Pars. on Cont. (5th ed.) 269; Collyer on Part. (Perkins's ed.) 999. But it is said that a ship's husband, as such, has no lien for his advances on the vessel, or on the proceeds of it. The Larch, 2 Curtis C. C. 427; *Ex parte* Young, 2 Ves. & B. 242; Smith *v.* De Silva, Cowp. 469.

(*d*) French *v.* Backhouse, 5 Burr. 2727; Bell *v.* Humphries, 2 Stark. 345.

(*e*) As to the limits to his powers, see Campbell *v.* Stein, 6 Dow, 135; Ogle *v.* Wraugham, Abbott on Shipp. 107; Turner *v.* Burrows, 5 Wend. 541;

3. *Of Mortgagees, Mortgagors, and Charterers.*

It is sometimes a question who is an owner of a ship,
* 571 in such a * sense as to make him liable as a part-owner, for repairs or supplies. A mortgagor retains an equitable title; a mortgagee has the legal title; a hirer of the vessel by charter has possession of her in some degree; and, as to all these, the question may arise as to their liability. In general, this must be determined by ascertaining, first, who has the benefit of the repairs and supplies; and, secondly, to whom, and on whose credit, are they given. Various circumstances answer these questions differently, in different cases. But the most general answer is given by the possession of the vessel. Thus, it seems to be a common rule in case of a mortgage, that the party who has the actual and visible possession and control of the ship, whether mortgagor or mortgagee, is the owner for this time and purpose. (*f*) So, if the charterer hires only the burthen of the ship, leaving her within the control and management and possession of the owner, the liability for repairs or supplies is not transferred by the charter from the owner to the charterer; but it is so transferred when the charterer hires the ship bodily, and mans and supplies and sails her himself.

If, however, a mortgage is not recorded, or known, or a charter-party made known, it cannot be permitted to affect a third party, under the same principle as that repeatedly stated in this work, that no arrangements by and between copartners can impair the rights of third persons dealing with them without knowledge of such arrangements. But questions of this kind do not occur so often between part-owners, or in reference to their several interests or obligations, as between partners. (*g*)

8 id. 144; Patterson *v.* Chalmers, 7 B. Mon. 595; Foster *v.* U. S. Ins. Co., 11 Pick. 85; Robinson *v.* Gleadow, 2 Bing. N. C. 156; Hewett *v.* Buck, 17 Me. 147; Sawyer *v.* Freeman, 35 id. 542; Sims *v.* Brittain, 4 B. & Ad. 375. But, under the general law of agency, if any of these acts are ratified by the other part-owners, they will be bound by them. Hagedorn *v.* Oliverson, 2 Maule & S. 485; Routh *v.* Thompson, 13 East, 274.

(*f*) Miln *v.* Spinola, 4 Hill (N. Y.), 177; Hodgsdon *v.* Butts, 3 Cranch, 140; Tucker *v.* Buffington, 15 Mass. 477. See, however, Myers *v.* Willis, 17 C. B. 77, affirmed in 18 id. 886.

(*g*) For cases bearing on the rights and liabilities of persons who are *quasi* part-owners, by mortgage or other-

4. *How far Part-owners are bound for the Torts of each other, or of their Servants.*

As each part-owner is, to some extent, the agent of the others, * and as the master, officers, and crew of the * 572 ship are the agents or servants of all the owners, we must look to the law of agency for their liability for torts, other than those of their own direct action.

The rule would seem to be this: All the owners are liable for the consequences of a wrongful act of a person employed by them, or of one part-owner, so far as he is acting as the agent and representative of the others, if this tort be committed in obedience to positive direction, or while in the actual discharge of a duty committed to him, or as a part of a service committed to him; and this rule extends to all cases of mere negligence, however gross. But if the tort were an act of personal malice, intentionally done, it does not affect with a liability for its consequences any but those who are participants in the malice and intention, or by whose express orders the act was done. (*h*)

wise, see *Ex parte* Matthews, 2 Ves. Sen. 272; Atkinson *v.* Maling, 2 T. R. 462; Mair *v.* Glennie, 4 Maule & S. 240; Hay *v.* Fairbairn, 2 B. & Ald. 193; Portland Bank *v.* Stubbs, 6 Mass. 422; Tucker *v.* Buffington, 15 id. 477; Badlam *v.* Tucker, 1 Pick. 389; The Romp, Olcott's Adm. 196; Dean *v.* McGhie, 4 Bing. 45; Fisher *v.* Willing, 8 Serg. & R. 118; Champlin *v.* Butler, 18 Johns. 169.

(*h*) Beawes, Lex Mercatoria, 54; Stinson *v.* Wyman, Daveis, 172; The Waldo, id. 161; Dusar *v.* Murgatroyd, 1 Wash. C. C. 13, 17. In Sherwood *v.* Hall, 3 Sumner, 127, and in Walcott *v.* Willcutt, U. S. D. C. Mass., "Boston Courier," May 29, 1858, it was *held*, that the owners of a fishing vessel were liable for damages for the abduction of a minor by the captain, although they had no personal knowledge of the fact, the act being *held* to be within the scope of the authority of the master as the agent of the owners. Boucher *v.* Lawson, Cases temp. Hardw. 78, 183; The San Juan Baptista, 5 Rob. Adm. 33; The Thames, id. 345; Stone *v.* Ketland, 1 Wash. C. C. 142; The Karasan, id. 291; Die Fire Damer, id. 357; Nostra Signora de los Dolores, 1 Dods. 290; L'Invincible, 1 Wheat. 238; The Anna Maria, 2 id. 327; The Amiable Nancy, 1 Paine C. C. 111, 3 Wheat. 546; Talbot *v.* The Commanders of Three Brigs, 1 Dallas, 95; Del Col *v.* Arnold, 3 id. 333; Arnold *v.* Del Col, Bee Adm. 5; Gibbs *v.* The Two Friends, id. 416; The Zenobia, Abbott Adm. 80, 93; The Aberfoyle, id. 242, 1 Blatchf. C. C. 360; The Druid, 1 W. Rob. 391; Richmond Turnpike Co. *v.* Vanderbilt, 1 Hill, 480, 2 Comst. 479; The State Rights, Crabbe, 22, 24; Duggins *v.* Watson, 15 Ark. 118; Penn. & Reading R. Co. *v.* Derby, 14 How. 468; The Brig Casco, Daveis, 184; The Phebe, Ware, 263; Reynolds *v.* Toppan, 15 Mass. 370; Dios *v.* The

Owners of the Revenge, 3 Wash. C. C. 262; The Dundee, 1 Hagg. Adm. 109, 113, 120. [The rule of law now seems to be, that the master is responsible for the wilful acts of his servant, if done in the course of his employment; not otherwise. Limpus *v.* London Omnibus Co., 1 H. & C. 524; Weed *v.* Panama R. R. Co., 17 N. Y. 362; Caswell *v.* Cross, 120 Miss. 545; Hanson *v.* E. & N. R. R. Co., 62 Me. 84.] In England, in an action against several defendants (under Stat. 53 Geo. 3, ch. 159), as ship-owners, for damage sustained by the loss of goods laden on board their ship, it was *held*, that they were not liable in that character beyond the value of the ship and freight, due or to grow due, although the loss was occasioned by the misconduct of one of the defendants, who was both master and part-owner. Wilson *v.* Dickson, 2 B. & Ald. 2. See Brown *v.* Wilkinson, 15 M. & W. 391, per Parke, B.; Cannan *v.* Meaburn, 1 Bing. 465; The Volant, 1 Rob. 385. The part-owner, through whose misconduct the loss occurred in Wilson *v.* Dickson, *ante*, would not be protected. See The Tribune, 3 Hagg. 114. [The negligence of a compulsory pilot is not the negligence of the master or owner of the vessel. Marshall *v.* Moran, L. R. 3 P. C. Cas. 205. If a ship, through the master's negligence, gets aground, and is then driven by the wind and tide upon a sea-wall, to the injury of the wall, the owners will be liable, if he do not break up the ship, after the lapse of a reasonable time within which to get out the cargo. Bailiffs of Rumney Marsh *v.* Trinity House, L. R. 5 Ex. 204; s. c. affirmed L. R. 7 Exch. 247.]

INDEX.

INDEX.

THE PAGES REFERRED TO ARE THE STAR PAGES.

A.

ABROAD. (*See* FOREIGN FIRM.)

ACCEPTANCE. (*See* BILLS OF EXCHANGE.)

PAGE

ACCOUNT, Ch. XVI. 508
when an, will be ordered (Sec. I.) 508
right to demand, peculiar to partners and their representatives in interest 508
every partner has a right to an 92, 508
right of an, may be transferred by a partner to his representatives 508
every person who has acquired a partner's interest in the joint fund may call for an 509
courts of equity have power to grant any partner or his representatives an, for cause 510
rulings on this subject in the different States . . . . 510 n. (*d*)
a decree for, and reasons 299
cannot be demanded by one partner in respect of particular items . . . . . 299 n. (*s*)
may be rendered unnecessary by agreement between partners or their representatives 511
in case of dissolution must be an, if demanded by a party in interest 299, 511
may be decreed without a prayer for dissolution 512
in a suit in equity for a dissolution and an, alleging that dividends of profits were to be made at stated periods, the court may decree the payment of the sum due before the distribution of assets . . . . . 512 n. (*k*)
when it may be opened for error (Sec. II.) 513
parties may agree that an, shall not be opened for error . . . 513
a suit to impeach an account must be brought within a reasonable time . . . . . 514 n. (*n*)
but if fraud be shown, courts will open the account after any length of time 514

ACCOUNT — *continued.*
where the bill praying for the opening of an account does not allege fraud, but in the opinion of the courts the facts stated imply fraud, it will be granted 515
courts of equity may infer, judicially, a fraudulent purpose from suspicious circumstances . . . . . 515 n. (*r*)
how it should be taken (Sec. III.) 519
parties may regulate their manner of taking account by their agreement 519
an agreement may be inferred from their having settled their accounts for a length of time in a certain way 519
need not be signed by the parties if there be other evidence of acquiescence 519
a party not objecting to an account for a long time will be deemed to acquiesce in it 519
the terms of an account are not conclusive, where fraud or extreme injury can be shown 521
manner of proceeding when a decree for an account issues . . 521
must be continued until the day on which it is made, or until a previous dissolution 523
a rule prescribing the method of making up an account . . . 524
may be decreed when a dissolution is not necessary 300
where agreed upon by the parties 301
implied intention of parties as to, regarded by equity . . . 302
having been once admitted by a party to be correct, he cannot afterwards file a bill to have one taken in equity without charging specific acts of fraud against the defendant 515 n. (*r*)
a party seeking to open must specify the errors particularly . 516
will be opened at any time for fraud or mistakes so far proved that the court is satisfied they ought to be corrected 516 n. (*s*)
will not be opened where it has been signed or security taken on the foot of, unless the whole transaction appear fraudulent . . . . . 516 n. (*s*)
if the plaintiff show an omission has been made of a credit due, he will be permitted to add it 516
the plaintiff may be permitted to remove a wrong charge stated in the account 517
the practice in England, when a partner owing a private debt to the partnership petitions for an 517

ACCOUNT STATED,
demand of partner against partner founded upon a balance of . 278
general rule as to 278
agreed upon between a surviving partner and the representative of a deceased one, effect of . . . . . 278 n. (*z*)
as a final balance 279
an express promise to pay balance of one is not necessary . . 280
not necessarily a final balance 281
all the partners must be bound by 281

ACCOUNT STATED — *continued.*
not necessarily a general balance 282
law as to, in Vermont . . . . . 282 n. (*g*)
law as to, in Illinois . . . . . 282 n. (*g*)
effect of, whether settlement obtained by consent, by law, or by arbitration 283
where it did not embrace all the debts, effect of 284
declared on, action not sustained by a balance struck by one partner without the consent of his copartner 284
outstanding debts of themselves will not necessarily defeat an action upon 284
where there is a mistake in one 284
where expenses are incurred by some of the partners on account of the old firm, subsequently to declaring an . . . 284 n. (*m*)
where after settlement and dissolution, one partner is obliged to pay a claim not included in settlement, he may recover in assumpsit against copartner . . . . . 284 n. (*m*)
where one partner covenants with another that he will account. 285
assumpsit will lie between partners for an . . . . . 510 n. (*a*)
retained by a partner without objection, assent and promise will be implied . . . . . 510 n. (

ACCOUNTS,
of the firm should be kept, how 228
may be examined at the pleasure of each partner 228
provisions as to 242
where contained in articles 242
when the articles may provide a method of closing 243

ACKNOWLEDGMENT,
before acknowledgment of a partner as to a debt can be received to bind others, joint debt must be proved *aliunde* . 184 n. (*n*)
(*See* POWER OF PARTNERS.)
statute concerning, Mass. Gen. Sts., ch. 155, § 14 184

ACT OF BANKRUPTCY. (*See* BANKRUPTCY.)

ACTION,
cannot be brought by that partner alone in whose name the partnership business is transacted 128
all actual partners must be made co-plaintiffs 128
one suing a firm not obliged to add the name of a person, only because he is held out as a partner 135

ACTIONS,
against a firm must be brought against all the partners, by name including the bankrupt, unless he has been discharged . . 475
for the recovery of debts due to the firm in case of bankruptcy of a partner, are brought by solvent partners and the assignees of the bankrupt 475
do not abate by the bankruptcy of the plaintiff . . . 475 n. (*a*)

ACTIONS AGAINST PARTNERS,
non-joinder of a dormant partner . . . . . 290 n. (*y*)
(*See* Of the Remedies of Third Persons against the Partnership and against Partners, Ch. X.)
(*See* Of Remedies by Partners against Third Parties, Ch. IX.)

ACTIONS BETWEEN FIRMS HAVING A COMMON MEMBER,
cannot be maintained at law 288
an indorsee of one of the firms may maintain an action against the other . . . . . 289 n. (*u*)
after the death of the common member 290
in case of a dormant or secret partner 290

ACTIONS BETWEEN PARTNERS,
on contracts arising before the partnership 271
on contracts arising after the termination of the partnership . 271
may be brought for causes originating in the relations of partners to third parties after dissolution . . . . . 272 n. (*j*)
where transactions are separated from partnership affairs . . 273
where the transaction is entered upon the partnership books . 275
where there has been a breach of an express stipulation between partners 276
where a partner gives his copartner a sum of money for a specific purpose 277
for contribution 285
for contribution in a transaction separate from the accounts of the firm, ... 287 n. (*s*)
contribution cannot be claimed by one partner for payment for a tort . . . . . 287 n. (*s*)
(*See* Of The Rights and Duties of Partners between themselves, Ch. VII.)

ACTIONS BY PARTNERS,
names of all the partners must be set forth 289
non-joinder of a dormant partner 291
where both ostensible and secret sue on a partnership contract . . . . . 291 n. (*a*)
all who are partners at the time a debt was contracted must join to recover it 329
as to partners who leave the firm 331
as to new partners 331
where one member of the firm is an alien 327
where the cause of action arises during war . . . . 327 n. (*f*)
where one of the partners resided in the enemy's country during the war 327
where by the law of a foreign country a husband and wife may be members of a firm 327

ACTUAL PARTNER,
when a person is liable as one 66
if a person is partner in relation to others who are copartners, he is so in relation to third persons 66
an indirect interest in profits will not render a person liable as an 67
where a person stipulates for an interest in the profits of a business as a reward of labor, instead of a certain sum of money proportioned to those profits, he is not a partner . . . 67, 68
where a trader makes an arrangement with a third person in regard to a transaction, whereby he becomes interested in the profits as profits 70
a payment or promise to pay money out of the profits as a specific proportion of profits does not of itself make payee a partner 70
the nature and character of the interest in profits always to be inquired into 71
where one by his bargain acquires interest in and control over profits while undivided, he is a partner 71
same principle governs whether a party puts in labor or property; law in both cases summed up . . . . . 71 n. (*l*)
where parties make a contract for a joint action, which does not produce that community of profit which would make them partners, and also declare they are not to be partners . . 82
intentions as expressed, and as they may be inferred from the bargain, prevail 85
where parties enter into such an agreement as constitutes them partners, and say nothing about partnership, they are partners 86
where parties declare their intention not to be partners, after having made such an agreement as constitutes partnership, they are nevertheless partners 86
law gathers the intentions from all the words and all the acts of parties 87
where one intention distinctly implied by their acts, and another asserted in words, the first prevails 87

ADMINISTRATORS,
of a deceased partner putting assets they have in their own hands into the hands of the surviving partners to trade with, are responsible for any loss occurring 505

ADMIRALTY, COURTS OF,
power of, in the employment of a ship, when the part-owners disagree 58
where the owners disagree, will direct the employment of a ship as shall seem most advantageous for all concerned . . . 560
where the owners of a ship disagree as to the employment, and the court directs it, those who get possession will be required to give security to those who are defeated 560

ADMIRALTY, COURTS OF — *continued.*
rule in the English court of admiralty 560
may decree a sale of the ship in this country 561
in case of a foreign ship, will not interfere to displace a master who is a part-owner . . . . . 562 n. (*w*)
(*See* PART-OWNERS OF SHIPS.)

ADMIRALTY, ENGLISH, COURT OF,
as to seizure and restoration of partnership property 504

ADMISSIONS. (*See* REPRESENTATIONS.)

ADOPTION. (*See* PARTNERS, REPRESENTATIONS AND ADMISSIONS. JOINT DEBT. INCOMING PARTNER.)

ADVANCES BY A PARTNER,
provisions for, in articles, effect of 240

ADVENTURE. (*See* PARTNERSHIP.)

AFFAIRS OF PARTNERSHIP,
partners may sue each other on affairs not connected with the partnership 270

AFFIDAVIT. (*See* LIMITED PARTNERSHIP.)

AGENCY. (*See* AGENT, AND AUTHORITY OF PARTNERS.)

AGENT,
may be a partner as to third persons 51
as to his principal has only the rights which spring from his employment 51

AGREEMENT BETWEEN PARTNERS,
that one shall not engage in the same business on his own account 244
where a partner violates such agreement 244
under seal 275
to exempt a retiring partner from liability, effect of 421
where creditors become parties to, for consideration 421
as to what property shall belong to one or another, in case of dissolution, will be valid 421

AGREEMENT TO ENTER INTO PARTNERSHIP,
a specific performance of, decreed in equity 235

ALIEN,
can be a partner if a friend 27
when the property is real estate 27
cases in which equity interferes, in a country where an alien could not hold land 27
if one of many partners hold the title and there were no aliens 27
otherwise as to alien enemies 27
war suspends a partnership with an alien friend 27

ALIEN — *continued.*
in what cases peace revives the partnership 27
cannot bring an action in a court of a hostile country . . . 28
citizens resident in a foreign country, when considered aliens . 28
a firm consisting wholly of aliens may bring personal actions in this country by means of an agent 28
partnership formed by husband and wife in a foreign country in which it could exist, effect of here 28

ALLOWANCE. (*See* RIGHTS OF PARTNERS, SURVIVING PARTNERS, AND COMPENSATION.)

ALTERATIONS. (*See* ARTICLES OF PARTNERSHIP, AND CHANGE IN THE PARTNERSHIP.)

ANNUITY. (*See* PARTNERS.)

APPOINTEE,
of a partner under a power of appointment must assume that relation by his own act. 452
and consent will not, generally, be assumed from mere silence 452
a rule in equity that he has a right to inspect the books and accounts of the partnership before making his election . . 453

APPROPRIATION OF PAYMENT,
when the right of debtors 427
when the right of creditors 427
when the act of law 427
by the creditor is not conclusively exercised by entries in his book, if not communicated to the other party 428
a retiring partner not bound by a fraudulent 429
fraudulent exercise of 429
when it becomes a matter of law 430
when the new firm for adequate business causes appropriate the funds of the old firm to the payment of new debts . . . 430
when the paying party makes no appropriation 430
where made by the creditor in expectation of the insolvency of the new firm 430
where not made by the creditor until he had heard of the insolvency of the new firm, and then made so as to hold the retiring partner 430
no person allowed to change, for his own benefit, an appropriation once made by him 430
when, may be implied from the payments themselves 431
when the right of election as to, applies 432
when a person has an account with a banking firm which is dissolved, and his account continues as before 432
the doctrine of appropriation applies only where the debts and accounts are distinct in themselves and so regarded by the parties 432

APPROPRIATION OF PAYMENT — *continued.*
when payment is not applied to the earliest items in an account . . . . . 432 n. (*v*)
when debtors commit a breach of trust in respect to certain property, and afterwards make payment generally on account of their creditor, who is ignorant of the breach of trust 433
must be to legal and not illegal demands 433

APPROPRIATION OF PROPERTY TO A PARTNER,
provisions for 252
where agreed that certain property used by the firm shall belong to one partner 252
with reference to the creditors of the firm 252
of property held forth as partnership property 254

ARBITRATION,
one partner cannot bind the partnership by an agreement to refer 176
where all the partners agreed to submit a question, and afterwards refused, there might be a remedy either in equity or at law 177
submission by unsealed agreement of one partner held in some States to be valid . . . . . 178 n. (*f*)

ARBITRATORS,
appointed to arbitrate on a certain measure regarded by two partners as a dissolution, not bound to direct the dissolution . . . . . 467 n. (*t*)

ARTICLES,
bill in equity for specific performance of 234
where the act required is a legal obligation created by law . . 235
provisions in, that have never been acted upon 238
waiver of provisions in 238
construed strictly in relation to any material change in the business 238
where they provide a method of closing accounts, effect of . . 242
where they exclude some specific business 243

ARTICLES OF COPARTNERSHIP,
of the (Ch. VII. Sec. VII.) 231
general principles of the construction 231, 232
and effect of 233
where the partners have none 231
not any difference, whether spoken or written, in their effect and operation 232
third parties not affected by them until notice 233
when courts of equity will refuse to carry into effect minor stipulations in . . . . . 233 n. (*i*)

ARTICLES OF COPARTNERSHIP — *continued.*
when silent on points established by law 234
when under seal 275
(*See* PARTNERSHIP.)

ASSIGNEE OF FOREIGN FIRM,
possession by, would prevent an attachment or levy on the property of the firm in this country 474

ASSIGNEES,
may lose their claim against a retiring partner for debts due from the firm, by making themselves responsible 478
under a commission of bankruptcy, employing an agent to receive money, if he embezzle it, may be liable to make it good, unless he consulted the body of the creditors in the appointment . . . . . 478 n. (*h*)
of a bankrupt partner take only his interest in the joint property 483
of a firm take both the firm property and the several property of the partners 483
of a bankrupt partner may claim unpaid instalments due from a solvent partner for his admission into the firm 503
under a separate commission take only such undivided interest as the bankrupt himself had, and in the same manner as he held it 503
of a stockholder in an insolvent corporation succeed to the rights of their assignor . . . . . 546 n. (*p*)

ASSIGNEES OF A BANKRUPT PARTNER,
do not become partners in his stead 471
become tenants in common with the other partners 471
may claim an account, and require a settlement of the concern . 472
cannot take the business in their own hands and settle it . . 472
have much the same rights and remedies as the representatives of a deceased partner 472
cannot bring trover against the partners for the partnership effects 472
may hold the partnership effects as well as the solvent partners, all being equally entitled to possession 473

ASSIGNING PROPERTY,
must be done in the regular business of the firm 163
that a partner has not power to assign property of the firm in any unusual way 164
the firm being insolvent, may a partner assign all the property in trust to pay creditors 165

ASSIGNMENT,
effect of, by a partner of his interest in a copartnership . . . 160
gives the assignee a right to insist on an account . . . 160 n. (*e*)
(*See* DILECTUS PERSONARUM.)
by one partner of all his interest, effect of 400

ASSIGNMENT OF DEBT,
if a debt due to the firm be assigned by one partner to his co-partner, notice shall be given to the debtors . . . 329 n. (*o*)

ASSIGNMENT OF PROPERTY OF FIRM,
right of (Ch. VII. Sec. II.) 162
right of every partner to assign in the regular business of the partnership absolute 162

ASSUMPSIT,
action of, will lie between partners where a balance of accounts is struck . . . . . 510 n. (*d*)

ATTACHMENT,
by a creditor of a partner of his interest in the firm property . 352
of a partner's interest suspended by bankruptcy 474
would not be suspended where a foreign firm went into bankruptcy abroad, and a creditor of one of the partners attached his interest in this country 474
would be prevented if the foreign assignee had taken possession of the property 474

AUTHORITY,
of the firm to one partner to use the partnership name outside the business of the partnership may be express or inferred from acts 112

AWARD OF ARBITRATORS,
cannot of itself effect a dissolution 467

B.

BALANCE OF ACCOUNT. (*See* ACCOUNT.)

BANKERS. (*See* JOINT-STOCK COMPANIES.)

BANKRUPT PARTNER,
discharge of, does not affect indebtedness of other partners, excepting as to the sum which the creditor takes by way of dividend 475
where made defendant in an action against the firm after his discharge, may have judgment against the plaintiff 475
taking up the notes of the firm after getting his certificate is permitted to prove against the joint estate . . . . . 476 n. (*x*)
assignees of, take only his interest in the joint property . . . 483

BANKRUPTCY, Ch. XV.
when and how it dissolves a partnership (Sec. I.) 469
in England, dissolution does not take place until bankruptcy has been declared by competent authority 469
in this country dissolution takes place when the assets are vested in the hands of the assignee 469

BANKRUPTCY — *continued.*
where there are no statutes of insolvency, inability and refusal to pay debts does not of itself operate a dissolution . . 470
acts upon a partnership in many respects like death of the partners 471
foreign, would not suspend the attachment or levy on the interest of the partnership property, found and attached here, before possession taken by foreign assignee 474
where all the partners of a firm become bankrupt, the discharge of one affects only himself 475
of a plaintiff, his assignees may continue an action in his name 475
where actions for the recovery of debts due to the firm are brought by the solvent partners and the assignees of the bankrupt 475
operates a discharge of an execution against the partnership . 476
a decree of, in England, goes back by relation and makes the bankruptcy effectual from the first act of 476
in this country, generally, a decree of, takes effect only from its own time 476
of a partnership in case of, joint property forms a fund for joint creditors, and separate property of each partner a several fund for the private creditors of each 480
of a partnership, all the firm property and all the several property of the partners goes to the assignees 438
a creditor of the firm taking several notes from the partners has no rights as a partnership creditor 485
where a partner takes property from the firm, and bankruptcy ensues, the property so taken will be held to satisfy any balance due from the partner to the firm 491
rule of appropriation of funds where the firm and all the partners are bankrupt 493
in case of, where property appears either in the separate estate of a partner or the joint estate of the firm to have been abstracted from the other, it must be restored 494
where the joint estate is larger at time of, on account of any fraudulent act against one of the partners, his several creditors may proceed against it for that amount 500
if any contracts or enterprises are outstanding at the time of, the assignees must wait until they are adjusted, and take the share of the bankrupt in the result 503
sale of the effects in, usual course adopted by assignees . . . 506

BANKRUPTCY OF A PARTNER,
where other partners are solvent, effect of, on the solvent partners 471
property rights and interests of a bankrupt partner pass to his assignees 471
where there is a provision in the articles that, in case of, the others shall take his share at a valuation and continue the business, effect of 473

BANKRUPTCY OF A PARTNER — *continued.*
notice of, not necessary to prevent the partner from being bound by new debts 473
when it operates a dissolution 473
annuls any attachment or execution of his interest in the firm . 474

BILL IN EQUITY. (*See* EQUITY.)

BILLS OF EXCHANGE,
drawing and indorsing of, by partners . . . . . 199 n. (*a*)
drawn or accepted fraudulently 211
of a partner or partners, where equity will restrain its negotiation . . . . . 212 n. (*l*)
drawn in blank and filled or indorsed, but not delivered or negotiated before dissolution of the firm 390

BOND,
where taken of one partner for a simple debt of the partnership . . . . . 107 n. (*i*)
given for a simple contract debt operates as a release of that debt . . . . . 107 n. (*i*)
taken from an ostensible partner for partnership debt extinguishes claim against secret partner afterwards discovered . . . . . 108 n. (*s*)
(*See* PARTNERS.)

BOOKS OF ACCOUNT. (*See* ACCOUNT, EQUITY, AND RIGHTS AND DUTIES OF PARTNERS.)

BROKERS. (*See* AGENT AND PARTNERS AS TO THIRD PARTIES.) 47, 50, 145

C.

CAPITAL. (*See* PARTNERSHIP AND PARTNERSHIP PROPERTY.)

CAPTAIN OF A SHIP. (*See* PART-OWNERS OF A SHIP.)

CARE AND SKILL AND TIME,
provisions for giving, to the partnership 243
(*See* PARTNERSHIP.)

CERTIFICATE OF LIMITED PARTNERSHIP. (*See* LIMITED PARTNERSHIP.)

CESTUI QUE TRUST. (*See* TRUSTEES.)

CHANGE IN THE PARTNERSHIP, Ch. XIII. (*See* PARTNERSHIP.)
effect of (Sec. I.) 406
by the retirement of a partner 406
causes dissolution 407
by the death of a partner 407
discharges bonds and other contracts 332, 333

CHARTERER,
when liable for the repairs and supplies of the ship 571
(*See* PART-OWNERS OF SHIPS.)

CLUBS. (*See* PARTNERSHIP.)

COMMANDITE. (*See* LIMITED PARTNERSHIP.)

COMMON CARRIERS,
partners, one of whom lost property intrusted to them, firm liable 156
action against, not in tort, unless special contract stated . . 158

COMMON LAW,
right of action between partners 277

COMMUNITY OF INTEREST, (*See* PARTNERS, PARTNERSHIP.)
must exist in the property or proceeds resulting from joint-doing, to make that partnership property 44
may be in profits only, and not in property 48

COMPANY. (*See* JOINT-STOCK COMPANIES.)

COMPENSATION,
of a partner's right to extra 229
after dissolution, partners who close up the affairs of the concern, in general, not entitled to . . . . . 230 n. (*c*)
where provided for by the articles 230
where one partner is exempted by the articles from rendering his services to the joint business . . . . . 230 n. (*z*)

CONDUCT,
which partners may require of each other 222

CONSIDERATION,
where no new consideration is given for a new promise to pay a debt 110
debt of one partner sufficient to sustain a promise of partnership to pay it 215
where a creditor agrees with a firm to discharge a retiring partner, the mere inadequacy of the, cannot be inquired into . 422
a new partner is not liable for old debts of the firm, unless he assumes them for 433
admission into the firm sufficient, to bind a new partner for the old debts of the firm, to those from whom the consideration comes 434
must be shown for a creditor giving up a claim on the firm and accepting a claim on one partner 487

CONTINUATION OF PARTNERSHIP. (*See* ARTICLES OF PARTNERSHIP.)

CONTRACT OF PARTNERSHIP. (*See* PARTNERSHIP.)

CONTRACTS,
between partners arising before the partnership 271
between partners arising after the partnership 271
of partners under seal 333
where a deed is substituted for a simple contract 333
made with one partner for the benefit of the firm 334

CONTRACTS — *continued.*
when the partner entering into the contract may sue alone . . 335
by a partnership for insurance 335
with a firm may be exchanged for another, only by consent of all parties 336
between the new partner and the old firm that the new partner shall become responsible for the old debts of the firm, valid between the partners, but not valid as to the creditors . . 434

CONTRIBUTION,
demand for 285
professional partnership not distinguished here from trading partnership . . . . . 286 n. (*r*)
when claimed for some transaction separate from the partnership accounts . . . . . 287 n. (*s*)
can be claimed only for an actual payment of a joint debt, 287 n. (*s*)
cannot be maintained by one partner against his copartner for payment of judgment founded on a tort 287

CONVERSION. (*See* TROVER.)

COPYRIGHTS,
held by partnership 265

CORPORATIONS,
may incur the liability of a partner as to third persons . . . 29
how far they may enter partnership as partners therein . 29 n. (*k*)

COSURETY. (*See* SURETY.)

COURTS OF EQUITY,
will interfere in case of dissolution, when and how 394
(*See* EQUITY.)

COVENANT,
with one partner not to sue him will not discharge his copartners . . . . . 172 n. (*w*)

COVENANT, ACTION OF,
when it will lie between partners . . . . . 275 n. (*w*)

CREDIT,
when given to one partner only 103
where partners agree that one shall purchase goods, and then let the others into an interest in them . . . . . 104 n. (*d*)
where there is no evidence to show to whom credit was given . 104
where, for money borrowed, a partner gives his own bill or note . . . . . 105 n. (*f*)
where the creditor sold goods or loaned money to the several partners on their several credit 105
to exonerate other partners, must be given knowingly and voluntarily to one or more exclusively 105
where given to one partner only, same rule applies to all simple contracts, whether oral or written 105

CREDIT — *continued.*
question as to whom given, one of fact for a jury . . . 105 n. (*h*)
where a creditor accepts the individual security of a partner instead of the debt of the firm 106
where a partner uses the credit of the firm for his personal advantage, without authority 111

CREDITOR,
may sue all the firm, notwithstanding stipulations between the partners exempting some 102
who became one without knowledge of agreement to exempt may levy execution on goods of partner exempted . . . 102
taking from one partner of a firm security of a higher nature than the debts, when it discharges the firm 109
whether intended to accept the sole liability of a partner in discharge of a joint debt of the firm, for a jury to decide 110 n. (*p*)
where security of same class with joint security is accepted by . 110
of a firm entitled to the assets of the firm until his debt is paid . 253
agreement of, to discharge some members of a firm 396
may lose his claim against a retiring partner for firm debts by the assignees making themselves responsible 478
of one or more partners may have the liability of the firm as security for the debt 485
in case of insolvency of his debtor may give up his security and prove his whole debt, or obtain what he can from his security and prove the balance 488
where the liability of the firm and that of the partners is concurrent, the creditor is bound to elect which he will take . . 489
has no direct lien on the partnership funds for his debts . 502 n. (*l*)
cannot file a bill to stop a partnership and wind up its concerns . . . . . 512 n. (*k*)
where he receives payment from the part-owner dealing with, in his negotiable bills or notes 566
(*See* BANKRUPTCY.)

CREDITOR OF A FIRM,
rights of, as to retiring partners 421
(*See* RETIRING PARTNERS.)
transfer by one, of an account against a firm, to the private account of one partner, without the knowledge of the firm . 423
accepting paper of the new firm for a debt of the old, with knowledge of the retirement of a partner 423
what consideration necessary for a release to a retiring partner 424
taking new security and retaining the old 424
where he gives the evidence of his debt to one of the partners, that he may collect it from the others 425
retaining expressly all his rights against the retiring partner . 425
must bring their actions only against the surviving partners . 447
creditors of a firm and of separate partners, how funds are distributed among 347, 480

CREDITOR OF A FIRM — *continued.*
rights of, not affected by any disposition of his property by a deceased partner 454
when delay on the part of, will be considered as a confirmation of the provisions of a deceased partner 454
have no claim on the assets of a deceased partner for any debts contracted after his death, except what he expressly places in the new partnership 454
dealing with the firm after the death of a partner, have only security on the property of the deceased partner for the amount he places in the new firm 454
may have the partnership security, and also several securities of the partners, as sureties for the debt 485

CREDITORS OF THE FIRM, RIGHT OF, AS TO ITS REAL ESTATE. (*See* REAL ESTATE OF PARTNERSHIP, HOW TREATED IN EQUITY.)

CUSTOM-HOUSE BONDS,
Act of Congress, March 1, 1823, Stat. 2, ch. 21, § 25 . 178 n. (*g*)

D.

DAMAGES,
may be recovered for a breach of contract to enter into partnership 237
from misconduct of a partner, provisions for in articles . . . 250
liquidated 250
where in fact a penalty 250
(*See* LIQUIDATED DAMAGES AND PENALTY.)

DEATH,
causes necessarily a dissolution 307

DEATH OF A PARTNER,
who was a member of two firms; whether the bar to an action between them is removed 326
a dissolution of partnership 397, 438, 453
where provision is made, that it shall not operate as a dissolution 439

DEBT OF A FIRM,
may become barred as to partners in the State, and not as to those out of it . . . . . 184 n. (*n*)
(*See* LIMITATIONS, STATUTE OF.)

DEBT OF ONE PARTNER,
incurred for the partnership, but before its formation, is not the debt of the partnership 215
is sufficient consideration to sustain a promise of the partnership, to pay it 215

DEBT OF SEPARATE PARTNER,
the property of the firm cannot be taken for 343

DEBTS,
may be changed from one debtor to another without any change in the partnership 148
adoption of debt due from a single partner, by the partnership, may be implied 148
change of, must be done by consent of all the partners, and for a good consideration 148
how the funds are appropriated to 480
what are joint and what are several 484
when originally joint or only several, and the creditor can show indebtedness of the other kind for the same cause, whether it discharges the old debt or is only collateral security . . 485
whether a, originally joint, has become several 485
whether a, originally several, has become joint 485
originally joint, afterwards becoming several, and consent of the creditor to give up all and retain only one, a consideration for the consent must be proved 487
where there is a new and old for the same cause, and it is not presumed that the new has paid the old, both co-exist, and the new is considered security for the old 488
secured by the specialty of one partner, when regarded as a simple contract debt and all the partners bound by it, 510 n. (*d*)

DEBTS DUE BY THE PARTNERSHIP,
appropriation of the property to 342

DECEASED PARTNER,
right of the representatives of, to have an account taken . . . 446
settlement of the estate of a 447
estate of, settled entirely on equitable principles 447
whether a creditor may proceed at once against the estate of the 448
the claims of the several creditors of, and joint creditors of the firm, are kept distinct 448
where there is no joint fund and the surviving partner is insolvent, the joint creditors of the firm take of the estate of the deceased partner *pari passu* with his separate creditors . 449
when the estate of a, is discharged by payment of the debt . . 449
or by a transfer of the account 449
notice of a dissolution by death never necessary to protect the estate of the deceased partner from the future debts of the firm 449
may limit the amount or proportion of his estate that shall remain in the partnership 454
where insolvent, and the administrators permitted to sell the stock in the usual course of trade for business benefit, and a loss occurred, they were not responsible 505
(*See* DEATH.)

DECLARATION. (*See* PARTNERS, ADMISSIONS AND REPRESENTATIONS OF.)

DECREE,
for dissolution of partnership may declare that the partnership never existed 457
(*See* EQUITY.)

DECREE OF DISSOLUTION FOR MISCONDUCT OF A PARTNER 457
will be granted when the conduct is of such a nature as to expose the other partners to important injury 458
will not be made for slight reasons 458
cases in which it would be granted . . . . . 458 n. (*e*)
where the mischief complained of is specific and a habit, the court may grant an injunction instead of a dissolution 459
cases of 460

DECREE OF DISSOLUTION WHERE MISCONDUCT IS NOT CHARGED 460
for bankruptcy or insolvency 460
for any cause which takes from a partner all his ownership . . 461

DEEDS,
where made to the partnership by the name of the firm . . . 333
where substituted for a simple contract with the same parties . 333
by a partner for the firm 109

DETERMINATION OF DIFFERENCES BY ARBITRATION,
provisions for 247

DEVISEE,
of a partner, where it is a condition that he is to become a partner in the firm, he must submit to the condition and offer himself as partner 452

DILECTUS PERSONARUM,
effect of, on representatives or assignees of a partner . . 11 n. (*k*)
great respect paid by courts to, in reference to transfer and incoming partners 13
must always exist, both as to original partnership and reception of a new partner 159
a partner cannot transfer his relation of partner 159
if a partner bequeathes his interest in a firm, legatee not a partner 160
assignees of a bankrupt partner not partners with the other members of the firm . . . . . 160 n. (*d*)
not a right of the old partners only, but of the proposed new one 161
where the interest of one partner was sold on execution . . . 355

DIRECTORS. (*See* JOINT-STOCK COMPANIES, AND NOTICE.)

DISCHARGE. (*See* BANKRUPTCY, BANKRUPT PARTNER, AND COVENANT.)

DISHONOR. (*See* NOTICE.)

DISSENT. (*See* PARTNERS, RIGHTS AND DUTIES OF.)

DISSOLUTION,
provisions for 244
of a decree for a 299
power of equity to grant 301
by a sale of goods under execution . . . . . 357 n. (*b*)
by a provision in the articles 380
power of equity to decree dissolution 381
where the articles omit all reference to 382
where the agreements are only oral, or they simply agree to be partners 382
where the partnership entered into long contracts of business . 383
where one of several partners agrees with a stranger for a sub-partnership 383
where formed for a single adventure 384
where formed for dealing in a subject-matter certain to expire at a certain time 384
by the will of all the partners 384
where contract of copartnership is under seal 384
consent to dissolution may be inferred 385
where there is an incorporation of the partners for the same business 385
general effects of 386
effects of, on the interests and rights of partners 386
no effect on property of partners 386
each partner, in absence of a special agreement, may compel a final settlement 386
each partner is still liable for the debt 386
power of each partner to demand and receive payment of debts 387
(*See* NEW YORK STATUTE, April 18, 1838, ch. 257) 387 n. (*a*)
without a special agreement leaves all the partners equal in rights and obligations 387
winding up the concern 388
powers of each partner in case of a dissolution . . . 388, 390, 396
where power of a partner passes to his administrator 388
where there is an agreement that one shall wind up the business 388
settlement by a partner in fraud of the firm valid as to innocent stranger 388
duty and power of settling partners 390, 392
rule as to, in Pennsylvania 390
authority given to continuing partners 392
where equity will interfere 394
no partner may claim payment for his services in case of . . 394

DISSOLUTION — *continued.*
effect of, upon third parties 394
agreements between partners upon 395
where the interest in the partnership has been transferred to an assignee 396
where the creditors consent to an agreement between partners after 396
notice of 397
by death of a partner 397
actions and remedies after 398
effect of, on an interest held on condition that the partnership exists 398
effect of on a lease held by the partnership from one of the partners 399
what acts dissolve a partnership 399
for outlawry 399
by a conviction for felony 399
by the act of a part of the firm only 399
by the marriage of a female partner 399
by an assignment by one partner of all his interest 400
where the assignee continues to act as partner . . . . 400 n. (*o*)
by sale on execution of the interest of a partner 400
by a partner by his own will 401
at what time and in what manner a partner may cause a . . . 401
by one partner, notice of, must be given to the other partners . 403
may be made prospectively 403
notice of, at will of a partner, need not be in writing . . . 404
by retirement of a partner 406
by any change in the partnership 407
after, one partner dealing with a person having no notice of, can bind his copartner, but only in transactions in the usual course of the firm's business 420
by death of a partner 438
by death of a partner, notice of not necessary 449
where one of the surviving partners is executor to the deceased partner, notice of dissolution should be given . . 449 n. (*f*)
of a dissolution by decree 457
what such a decree may provide 457
for any cause which takes from a partner all his ownership . . 461
caused by a levy of execution on a partner's interest and subsequent sale 461
by a sale by one partner of all his interest to his copartner, 461 n. (*j*)
an attachment on a mesne process would not cause a 462
not caused until actual transfer, if the partner retains possession 462
caused by the marriage of a partner who is a single woman . 462
caused by a partner passing under guardianship 462
caused by one of the partners being convicted of treason, or absconding for debt or felony 463

DISSOLUTION — *continued.*
insanity itself does not operate a 466
but if insanity were determined by due inquest, and public notice given, it would be held to operate a 466
because the continuance of the partnership has become impracticable 467
caused by bankruptcy 469
(*See* BANKRUPTCY.)
where there are no statutes of insolvency, inability and refusal to pay debts do not operate a 470
absconding does not operate a 470
simple insolvency, without an assignment or any judicial process, does not work a . . . . . 470 n. (*e*)
appointment of a receiver, in certain cases, operates a . . . 470
in case of, must be an account if demanded by a partner or a party in interest 511
in a suit in equity for, and an account, alleging an agreement that dividends of profits were to be made at certain periods, the court may decree the payment of the sums due thereon before the final distribution of assets . . . . . 512 n. (*k*)
of a limited partnership notice should be given, unless it comes by original limitation of time, or by some act of law . . 536
of a joint-stock company, a change in the members would not operate a, as in a common partnership 545

DISSOLUTION BY DECREE,
Ch. XIV. 457
for misconduct of a partner 457
courts of common law unable to grant 457
cases in which courts of law might dissolve a partnership . . 457
courts of equity have full power to grant a 457
(*See* DECREE, AND EQUITY.)
usually for causes occurring after formation of partnership . . 458
excluding one elected trustee in an unincorporated company may be good ground for a . . . . . 459 n. (*f*)
where misconduct is not charged 460
for bankruptcy or insolvency 460
will be granted for any cause which takes from a partner all his ownership 461
pecuniary inability of one partner to fulfil material engagements with the other partners sufficient cause for 463
inability of a partner to do his duty to the firm, caused by a permanent loss of health 463
would be granted for insanity 464
where the appointment of guardians would cause much delay, a court of equity would receive a petition from the next friend of the insane, and, upon cause shown, grant . . . 466
where the continuance of the partnership has become impracticable, will be granted in equity 467

DIVISION OF PROFITS,
provision for 249
(*See* ARTICLES.)

DORMANT PARTNER,
usually understood as one both secret and inactive 33
difference between a dormant and an open partnership . 33 n. (*p*)
(*See* PARTNERS.)
liable when discovered . . . . . 62 n. (*a*)
unless they plead in abatement, an action may be maintained against them alone . . . . . 62 n. (*a*)
non-joinder of, in an action by or against a firm 290
where the goods of the ostensible partner are attached and another creditor discovers a, and makes him defendant. . 360
where the ostensible partners were not dealt with on partnership account 360
rights and obligations of, as to the real estate of a partnership 368
rights of, when retiring 415
(*See* NOTICE OF RETIREMENT.)
liable for debts contracted during the partnership 416
who is a new partner 436
(*See* INCOMING PARTNER.)
need not give notice to cut off his personal liability for future debts; but, *quære*, how is it as to property left by him in the firm after his retirement 497
on the discovery of, creditors may elect whether to proceed against the ostensible partners alone, or against the actual firm property 500
where non-joinder of, either in an action by or against a firm, is not an objection to the maintenance of the suit . . 500 n. (*g*)

DOWER IN REAL ESTATE OF PARTNERSHIP,
where land is conveyed to partners as tenants in common . . 374
(*See* REAL ESTATE OF PARTNERSHIP, HOW TREATED IN EQUITY.)

DUTIES. (*See* PARTNERS, RIGHTS AND DUTIES OF.)

E.

EQUITY,
of questions between partners cognizant only by courts of equity (Ch. VIII., Sec. III.) 288
when it may decree specific performance of a contract to enter into partnership . . . . . 13 n. (*n*)
whether equity will give relief where security is taken of a higher nature than the debt, determined by the intention of the parties 109
where a partner attempts to bind the firm by a specialty, but, for want of authority, binds himself only 109

EQUITY — *continued.*
how it will treat the transferee of one partner's interest in the firm 169
will compel a specific performance of articles 234
may decree a specific performance of agreement to enter into partnership 235
may prohibit a partner from dissolving the firm . . . 236 n. (*o*)
may decree a partnership as of a past day 237
will not permit settled accounts to be opened without good reason 242
(*See* ACCOUNTS.)
where one partner, in violation of his agreement, engages in business on his own account 244
has full power to decree dissolution 244, 301
has power to remove a copartner 244
when would sustain conduct of majority not authorized by articles 249
will not relieve against liquidated damages, if legally due . . 251
will not enforce a sale of good-will 262
questions between partners cognizant only in 288
instances of a resort to 295
when will declare the partnership void *ab initio* . . . 296 n. (*k*)
methods and processes of, applicable in cases of partnership . 297
what is necessary to give jurisdiction to, in cases of partnership 302
will grant relief to a partnership as against third persons . . 340
effect of a decree of dissolution 381
how real estate of partnership is treated in . . . . . 441 n. (*o*)
will give relief in cases of negligence or gross mistake by surviving partners 442
will not prevent surviving partners from becoming purchasers from the representatives of the share of the deceased partner . . . . . 442 n. (*r*)
power of, in case of a dissolution of partnership 403
will restrain the surviving partners from continuing in business under the credit and risking the effects of the old firm . . 443
in case of insanity, where the appointment of guardians would cause mischievous delay, would receive petition from next friend, and, upon cause shown, decree dissolution . . . 446
will not interfere to decree the specific execution of an agreement for a partnership . . . . . 459 n. (*g*)
would decree a dissolution on the marriage of a partner who is a single woman, if circumstances prevented its operating as such 462
where the continuance of the partnership has become impracticable, will decree dissolution 467
will not generally enforce an agreement to refer any question to arbitrators 467
might decree a dissolution on the award of arbitrators . . . 467

EQUITY — *continued.*
all parties interested must be joined in suits in, whether as plaintiffs or defendants 475
rule in, that in bankruptcy of a firm, joint property forms a joint fund appropriated to the joint creditors, and the several property of each partner a several fund for private creditors 480
two firms having a common member may maintain an action between themselves in 480
when and how, will enforce the lien of partners on the partnership property for their claims . . . . . 502 n. (*y*)
may postpone a sale in bankruptcy for the general benefit of creditors . . . . . 506 n. (*w*)
will compel partners to keep a correct account of all the business of the firm in their charge 509
has full power to grant a partner or his representatives an account 510
will not interfere for a breach of the partnership agreement where law can give relief . . . . . 510 n. (*d*)
when, will entertain jurisdiction, although account or other action will lie between the parties . . . . . 510 n. (*d*)
sometimes infers judicially fraudulent purposes in the settlement of an account, from circumstances indicating it, 515 n. (*r*)
may sometimes infer an agreement between partners to settle their accounts in a certain way, and direct the account to be taken in a similar manner 519
has jurisdiction in matters of account between part-owners of a ship . . . . . 558 n. (*i*)
has jurisdiction wherever there is an express agreement between the part-owners as to the employment of the ship . 558 n. (*i*)
(*See* ACCOUNT, DISSOLUTION, INJUNCTION, RECEIVER, PARTNERSHIP, BANKRUPTCY.)

ERROR,
opening an account for 135
(*See* ACCOUNT.)
agreement between parties that account shall not be opened for error will be respected, unless fraud is shown 513

EVIDENCE,
where the signature of the firm has been attached to a paper by a partner when the burden is on them to show that it was fraudulent 201
that a bill has been accepted by one partner in fraud of the firm did not oblige the plaintiff, being indorsee, to prove under what circumstances it was indorsed to him . . . 211 n. (*k*)
by a partnership that the note or bill on which it is sued was in fraud of their rights . . . . . 212 n. (*l*)
burden of proof on creditors of the partnership to show that property is partnership property 257

EXECUTION,
against a partnership discharged by bankruptcy of the firm . . 476
(*See* ATTACHMENT.)

EXECUTOR,
when liable as a partner 146
when the deceased has made his partner his executor . . . 450
where a surviving partner is, he is not entitled to an allowance for carrying on the business after his partner's decease, 451 n. (*i*)
or trustee carrying on the business of a deceased partner pledges his own responsibility to the creditors 454
where an, without any authority from the will, trades with the assets, the testator's estate will not be liable in case of his bankruptcy . . . . . 454 n. (*q*)
to authorize an, to carry on a trade with the testator's property, the most distinct authority must be given by the will itself . . . . . 455 n. (*t*)

F.

FACTORS AND BROKERS. (*See* PARTNERS AS TO THIRD PERSONS.)

FALSIFICATION,
what it is 517

FELONY,
effect on partnership of conviction of a partner for 399
(*See* DISSOLUTION OF PARTNERSHIP.)

FEME COVERT. (*See* MARRIED WOMEN.)

FINAL BALANCE. (*See* ACCOUNT STATED.)

FIRM NAME. (*See* NAME OF FIRM.)

FIRMS HAVING A COMMON MEMBER,
can be no action at law between 288
may be in equity 480
in an action against one, the other cannot be summoned as a trustee . . . . . 288 n. (*t*)
demands between them 288

FRAUD,
fraudulent use by a partner of the name or property of the firm 103, 112, 164, 201, 210
presumption of, never absolute 112
but not rebutted by knowledge of the other partners that the obligation of the firm had been applied by one partner to pay his own debt . . . . . 112 n. (*t*)

FUNDS, JOINT OR SEVERAL (*See* DEBTS.) 484

G.

GAZETTE. (*See* NOTICE.)
GENERAL PARTNER,
definition of 34
GENERAL PARTNERSHIP,
admission by one that he is partner with others, not sufficient to prove *their* partnership . . . . . 195 n. (*s*)
(*See* PARTNERSHIP.)
GOOD FAITH,
between partners, required with great strictness 222
GOOD-WILL OF THE FIRM 261
definition of 262
treated by law and equity as a valuable property 262
sale of, will not be enforced in equity 262
when realized by the executor of a deceased partner 263
as to professional partnerships 264
when a retiring partner "sells out" . . . . . 409 n. (*h*)
goes to the survivors of a firm, without payment therefor on their part 444
GROSS EARNINGS. (*See* PARTNER.)
GUARANTY, (*See* SURETY.)
where transferred from the firm to a partner, or from a partner to the firm 337
GUARANTY AND BOND OF INDEMNITY . . . . 331 n. (*z*)
change in the firm discharges the surety 333
GUARDIAN,
when a partner is put under guardianship, his guardian becomes tenant in common with the other partners 463
GUARDIANSHIP. (*See* PERSONS UNDER GUARDIANSHIP.)

H.

HEIR. (*See* REAL ESTATE.)
HUSBAND AND WIFE,
may in some countries be partners; effect of in this 327

I.

ILLEGAL CONTRACTS,
no action can be maintained on 341
ILLEGAL OBJECTS,
which make a partnership void, instances of 10
whether our courts would take notice of a breach of foreign law 10

IMPOSSIBILITY. (*See* DISSOLUTION.)
INCAPACITY OF PARTNERS. (*See* DISSOLUTION.)
INCOMING PARTNER,
definition of 34
addition of a partner in law terminates the former copartnership 34
where one is received and treated as incoming partner . . . 161
liable for all subsequent debts of the firm 435
not liable for the old debts, unless he assumes them for consideration 433
not liable for goods ordered before but not delivered until after he enters the firm . . . . . 433 n. (*y*)
where goods are sold to a firm, and it is dissolved, and one of the old partners unites with a new one and forms a new firm, 433 n. (*y*)
admission into the firm is consideration enough to bind him to those from whom the consideration comes 433
a contract between, and the old members of the firm, that the incoming partner shall be liable for the old debts, like the other members of the firm, valid as between the partners . 434
not bound to creditors of the old firm by a contract with the old members to become responsible for them 434
not bound to the old creditors, unless on a promise for consideration, which may be express or implied 435
circumstances that would warrant a jury in finding an assumption of the old debts by an 435
no difference in regard to an, who is a dormant partner, except that a known partner is liable on the credit he gives as well as his interest, and a dormant partner on his interest only . 436
if he is a dormant partner, and agrees to assume the debts, he stands in the same position of a known partner who assumes them 436
not liable for the rent on a lease of real estate taken by the old firm 437
but if he joins with the old partners to pay an increase of rent, he will thereafter be liable for such an increase 437
where the bargain between the partners is that he shall be a partner as of a preceding day 437
INFANT,
incapacity of, to enter into partnership 17
may be a partner in a mercantile house, his father supplying the capital . . . . . 18 n. (*d*)
promise of, voidable and not void 18
may be ratified by him after of full age 18
ratification may be express, or implied by his acts, or inferred by law 18
statutes respecting 19
a mere acknowledgment that the debt exists is not always a ratification of the promise to pay 19
where an infant enters a partnership as an adult, and does not withdraw after he comes of age 20

INFANT — *continued.*
right of, to avoid his contract gives no right of avoidance to the other contracting party 21
privilege of avoiding extends to his legal representatives . . 21
a decree of bankruptcy against an infant void at law . . . 22 n. (*n*)
where a contract is made with a firm, and one of the members, who is an infant, repudiates his liability 22

INFANT PARTNER,
if, on coming of age, he repudiates his liability for debts of a partnership, must repudiate as to the profits 437
when he comes of age, may escape the obligations of the firm, under plea of minority 437
when, by remaining in the firm after full age, he confirms the debts contracted during his minority 437
may not claim a share of the joint funds of the old partnership and forbid an application of it to the firm debts 437

INHERITANCE OF REAL ESTATE OF PARTNERSHIP. (*See* REAL ESTATE OF PARTNERSHIP, HOW TREATED IN EQUITY.)

INJUNCTION,
a decree for, when and how granted 302
power of equity to decree an injunction 303
when equity will grant injunction 303
may issue without a dissolution 304
to restrain a partner from using the partnership property improperly 304
form of the order for . . . . . 305 n. (*m*)
where the partnership having been dissolved, one of the partners attempts to carry on the former business in a way injurious to the former partners 305
where an account has been settled between the partners . . . 305
where, on settlement, it is agreed that a partner shall not carry on a certain trade within certain limits 306
where one partner carries on a business injurious to the partnership 306
where a partner makes use of the name of the firm in any wrongful way 306
where one of the partners has deceased 307
will not be granted at the instance of one partner after judgment at law against the firm . . . . . 309 n. (*c*)
how obtained, (*See* EQUITY, AND COURTS OF EQUITY.)

INQUISITION OF LUNACY. (*See* INSANE, AND INSANITY.)

INSANE,
incapacity to enter into a partnership 28
a verdict of inquisition of lunacy has no retrospective influence so as to affect any honest transaction which took place previous to it 466

INSANITY,
a ground for a dissolution of a partnership 456
whether it does of itself dissolve the partnership 466
when determined by due inquest and public notice given, it would *per se* operate a dissolution 466
INSURANCE,
by a partnership, of the joint property 335
by one partner in his own name, of the joint property . . . 336
authority of a part-owner of a ship to insure may be inferred . 557
(*See* PART-OWNERS OF SHIPS.)
INTEREST,
money advanced to the firm for its use, by a partner, bears no interest, without specific bargain . . . . . 229 n. (*y*)
(*See* PARTNERS.)

J.

JOINDER OF PARTIES. (*See* ACTIONS.)
JOINT CREDITORS,
in England, are entitled to prove under a separate commission, for the purpose of voting in the choice of assignees . . 483
in this country, they may not 483
who are 484
where a partner owes a balance to the firm, joint creditors, they cannot prove it against his several fund, unless the balance is caused by a fraudulent abstraction from the joint funds 500
where they elect to proceed against the several estate of a partner, the several creditors of the latter may proceed against the joint fund for an equal amount 501
JOINT ESTATE,
where larger at the time of bankruptcy on account of any fraudulent act against one partner, his several creditors may proceed against it for that amount 500
JOINT-OWNERS,
either joint-tenants, tenants in common, or partners 548
JOINT PROPERTY,
what is 491
JOINT-STOCK COMPANIES, Ch. XVIII. 541
transfer of shares in, effect of 161
regulated by statute in England 541
are subject to the law of partnership 541
where all the property is in the hands of trustees, and the shareholders under an indenture which declares the trust have an equitable estate 542
usually have a common name 542
what right they have to change their name . . . . . 542 n. (*f*)
may have their by-laws and rules of proceeding by which they regulate the election of officers and the transaction of business 543

JOINT-STOCK COMPANIES — *continued.*
cannot have any common seal, and therefore cannot make a deed of any kind 543
in England, they are bound by contracts made by a competent board of directors . . . . . 543 n. (*h*)
cannot limit their liabilities and become a corporation or a limited partnership by their own act, without compliance with the requirements of the law 544
the directors, unless restrained by statute or the deed of settlement, have all the authority given to partners at common law . . . . . 544 n. (*k*)
a member of, liable precisely as a partner 544
a member of, may recover compensation for services rendered the company previous to his having become a member of it . . . . . 544 n. (*l*)
an action cannot be maintained between a joint-stock company and one of its members . . . . . 546 n. (*l*)
change in the members would not operate a dissolution . . . 545
the death of a member does not operate a dissolution . . . 545
respects in which they are like a partnership 546
JOINT-TENANCY,
all the incidents of, may be given to tenancy in common by agreement of the parties 548
JUDGMENTS,
an unsatisfied judgment against ostensible partner may be pleaded in bar to a suit for the same cause against both ostensible and secret 65
where obtained against one partner 107
where confessed by one partner against his firm . . . 178 n. (*y*)

L.

LABOR,
may be the only contribution of a partner 55
(*See* PARTNERSHIP PROPERTY.)
LAW,
presumption that all persons dealing with a partnership know the law of partnership 233
LEASE,
made to partners, effect of on the retirement of one partner . 417
of real estate held by a firm, a new partner coming in after the lease would not be liable for the rent 437
LEGACY. (*See* LEGATEE.)
LEGATEE,
where property is left to two or more persons by will, and they take hold and use it as partners 53
where the will contained expressions which would give the property the quality of a joint-tenancy 54
(*See* DEVISEE.)

LEVY. (*See* ATTACHMENT.)

LIABILITIES,
arising from annuities. (*See* STATUTE OF VICT.)
where it is certain, and not dependent on the amount of profits, the annuitant is not a partner, instances of . . . 136 n. (*d*)
where it arises from loans 140
where money is lent to a firm for more than legal interest . . 140
arising from loans where money is lent to a firm and the lender is to receive a certain share of the profits 141
arising from loans; what is the test of partnership in such cases 142
arising from leases 143
classification of contracts, by which the profits are to be divided between the parties 143
where an owner of a farm lets it out on half profits; this does not constitute a partnership 143

LIABILITY,
of a partner, where sought to be put upon one who is only a nominal partner 119
where persons have the same firm name, and do the same business, liable to inference of identity of partnership . . . 120
where one is a partner in a house for a particular business and the other partners carry on another business 121
declarations or acts tending to show that the parties are partners may make them liable as such to third parties . . . 122
where a person not publicly declared to be a partner is held out as such, with his consent, to one customer 130
where held out to one customer, with an injunction of secrecy . 131

LIBEL. (*See* ACTIONS AND TORTS.)

LIEN. (*See* MATERIAL-MEN, SHIP'S HUSBAND.)
for the purposes of the lien on ships, the States are considered foreign to each other 568

LIEN OF A PARTNER,
on the common property 265

LIMITATION,
may grow out of the nature of the transactions or business of the partnership 100
Statute of 9 Geo. 4, ch. 14 . . . . . 184 n. (*n*)
Statutes of, when they begin to run after death of a partner . 307

LIMITED PARTNERSHIP, Ch. XVII. 526
definition of 526
general principles of 528
principles of the statutes of the several States in regard to . 530
unless all the requirements of the statutes respecting, are complied with, the partners will all be liable as general partners 53
the capital of, must not be reduced during the partnership . . 532

LIMITED PARTNERSHIP — *continued.*
in New York, an arrangement of the firm for preference among their creditors, or to provide for a special partner as a creditor, is void 533
all suits must be brought by and against the general partners, unless the special partner has become a general partner by a violation of law or otherwise . . . . . 534, 537, n. (*e*)
but if the plaintiff seeks to hold the special partners beyond their limited liability, he must join them 535
if renewed after its expiration by its original limitation, there must be a renewal of the certificate, publication, and record 535
different ways in which it may be dissolved 535
when defects in the certificate, or in publication of record, or in any compliance with the requirements of law, if merely formal, do not vitiate 538
if substantial, they leave all liable as general partners . . . 538
affidavit to accompany the certificate of, need not follow the exact words of the statute . . . . . 538 n. (*w*)
certificate of, *primâ facie* evidence of its own truth, but cannot rebut positive testimony of its falsehood, on any material point 539

LIQUIDATED DAMAGES,
when courts will disregard agreement for 250
when courts will sustain agreement for 251
must be agreed upon for one distinct breach only 251

LOSSES,
caused by a breach of duty by one partner, effect of 224

LOSSES, SHARING OF. (*See* PARTNERS.)

LUNATIC. (*See* INSANITY.)

M.

MAJORITY OF THE PARTNERS,
power of 218
in dealing with third persons 219
in reference to the partners themselves 220
as to excluding a partner 384

MANAGING OWNER,
who is 569
(*See* SHIP'S HUSBAND.)

MARRIAGE,
of a female partner, effect of 399, 462
(*See* DISSOLUTION OF PARTNERSHIP.)

MARRIED WOMEN,
incapable of entering into partnership at common law . . . 23
the custom of London as to 23

MARRIED WOMEN — *continued.*
where a man never lived in that State of the Union in which his wife resides . . . . . 23 n. (*v*)
where a single woman is a member of a firm, her marriage dissolves the partnership 26
where a wife holds shares in a joint-stock company 26
where a man's wife inherits an interest in a partnership . . . 26
where the property was given to trustees for the sole benefit of the wife 26

MASTER OF A SHIP,
where he is a part-owner 561
(*See* PART-OWNERS OF SHIPS AND ADMIRALTY.)
where a part-owner, and the majority wish to displace him . . 562
(*See* PARTNERS OF SHIPS AND ADMIRALTY.)

MATERIAL-MEN,
who are 568
lien of, against the ship for the amount due them for repairs or supplies 568

MINES. (*See* PARTNERSHIP PROPERTY.)

MISCONDUCT OF A PARTNER,
provisions for, and damages for 250

MORTGAGE OF A SHIP,
in case of, the party who has actual control of the ship is the owner for the time and purpose 571
if not made known, will not affect a third party 571

MORTGAGEE OF A SHIP,
rights and liabilities 570

MORTGAGOR OF A SHIP,
rights and liabilities 570

N.

NAME OF FIRM,
every partnership should have one 125
need not be prescribed in the articles, or determined by agreement, 125
may grow out of the custom of the firm; instances of . . 125 n. (*f*)
where it avoids having one 125
where there is an adopted and recognized style 126
where a partnership style has been agreed on, and another name is also employed; instances of 126
where the name of one partner alone is the proper name of the firm, this name, with the addition of Co., will not operate as a signature of partnership . . . . . 128 n. (*m*)
may be the name of one of its members . . . . . 128 n. (*l*)
provisions respecting 254
where another name is used by a partner 254

NAME OF FIRM — *continued.*
the sanction of the firm to a change in the name may be implied, 255
a firm cannot be bound by any name but its own 255
a firm may have two names 255
fictitious names prohibited by statute in New York 255
where not agreed upon in the articles 255
where attempted to be used by an executor of a deceased partner 263

NEGOTIABLE PAPER 199
waiver of notice by one partner where the note is made for his own benefit 201
defences of partners to 200
when taken with knowledge that it was given for the debt of one partner only, presumed in this country to have been taken fraudulently 202
with the firm name, where the transaction is fraudulent, effect of . . . . . 202 n. (*d*)
given by one partner, when consent of the others may be implied, without a new consideration . . . . . 202 n. (*d*)
bearing the signature of the firm given by a partner to a third party for his own debt, effect of 202
doctrine of the English courts in reference to this 204
where given by one partner in payment of his separate debt, and for a larger amount than the debt, effect of 205
where received bearing only the signature of one partner, effect of 213
credit given on, only to those whose name it bears . 213, 274 n. (*s*)
where usage of the firm is to sign by only one partner . . . 213
where signed in a fictitious name, if authorized or adopted by the firm, effect of 213
may be signed by one partner, so as to hold all jointly and himself severally 213
of one of two firms connected in business and using the same name, effect of 214
indorsing of paper which does not belong to the firm, by one who is a partner; presumption against authority so to indorse it, 215
indorsed by the firm to one partner 327
who must sue on 333
promissory note indorsed in blank 333
a person taking, on the credit of several persons, in ignorance of the fact that they are partners, may prove against the parties severally, or against the firm 498
where taken with knowledge that the names were the names of partners 499

NET PROFITS. (*See* PARTNERS.)

NEW HAMPSHIRE,
statute of, concerning actions between copartners 285

NOMINAL PARTNER,
ostensible partner a nominal one also 31
usual meaning of this designation 31
may be called by his partner as a witness . . . . . 31 n. (*n*)
how different from dormant . . . . . 31 n. (*o*)
converse of the secret partner 32
where obliged to pay the debts of the firm, may recover from the firm . . . . . 273 n. (*u*)

NOTICE,
of a stipulation to one member of a firm is notice to all, 95 n. (*v*)
where a partner gives notice to a particular person, or the public generally, that he is not responsible for the acts of the others . . . . . 95 n. (*v*)
where the fact that a partnership is engaged only in a particular trade is known, this is a limitation of the authority of a partner; instances of 99
of dishonor to one of the joint indorsers of a note who are not partners, not sufficient . . . . . 196 n. (*u*)
to one of joint lessees, sufficient if they are partners; otherwise, not . . . . . 197 n. (*v*)
to one partner is notice to the firm 196
of dissolution in case of the death of a partner not necessary . 449
of dissolution not necessary in case of bankruptcy 473

NOTICE OF RETIREMENT OR DISSOLUTION,
must be given by retiring partner 410
manner of giving 411
as to former customers and new customers 412
rule as to 412
by public advertisement 413
when unnecessary 413
whether a person has, a question of fact 413
there must be dealing with the firm directly, in order to entitle a person to 414
what dealing would entitle a person to 415
as to a dormant partner 415
as to a dormant partner, when known to any customer . . . 416
governed by rules applicable to notice in other cases 417
in what manner it should be given 417
must be such as the usage of merchants requires 418
by the notoriety of the act 418
cases in which a jury might infer 418
when given in a newspaper 419
given to one of a partnership, binds the firm 420
to an agent, binds the principal 420
where given to a stockholder in a corporation 420
where casually given by advertisement to a director of a bank . 420
where given to a director expressly for the bank 420

O.

OBLIGATIONS,
of the partnership and the several obligations of a partner may be cumulative 149
where obligation of the firm purports to be superadded to that of a partner, no presumption that the firm obligation is discharged 149
OFFICES,
no partnership in 37
if held by two persons, governed by rules distinct from partnership 38
(*See* PARTNERSHIP.)
OSTENSIBLE PARTNERS,
who they are 30
when held out as partner with his consent 30
no especial way of holding such partner forth 30
where a partner generally unknown is made known to any one man 30
contract with, does not survive to a dormant partner 333
(*See* NOMINAL PARTNER.)
OWNERSHIP,
questions as to the, of goods, effects, or lands, determined by the general principles of the law of contracts 491

P.

PARTIES. (*See* ACTIONS.)
PARTNERS,
any persons, competent in law and fact to transact business on their own account, may become partners 16
competency of, in law and in fact 16
kinds of 30
who are as to each other (Ch. V.) 41
community of interest the basis of the relation 41
one or more may be guaranteed by the others against loss . . 41
if one does not participate in profits, but is liable for losses, may still be a partnership 41
must be a community of interest for business purposes . . . 42
clubs for social and charitable purposes not partnerships, 42 n. (*b*)
there must be a community of interest resulting from the work done 44
may be as to the buying of goods and the sending of them abroad, and not in the return cargo 45
when physicians or lawyers are 46
effect of the bargain where it was provided that one should find all the money, and the other do all the work, and the profits be divided 51

PARTNERS — *continued.*
if two mercantile houses recommend consignments to each other, and divide the gross commissions on sales of goods so recommended, they are *quoad hoc* partners . . . . 51 n. (*n*)
an agreement to participate in profits raises a strong presumption of partnership 51
but is not decisive 67, 72
if a known partnership enter into a bargain for purchase, sale, and joint profit, with a third party, for a single transaction, all are partners, but only as to that transaction 52
same person may be a partner in distinct firms 52
a firm cannot sue a firm, if one person be a partner in both, 52, 289
where a partner so situated transfers his interest 52
when persons are, in regard to each other, summed up . . . 54
each need not bring into the common stock labor and property, 55
difference between an undertaking by a number of persons jointly with intent to diminish a loss, and one for the sake of profit 57
the capital may remain the property of only one 57
whether partners as to each other must be determined by themselves 58
who are, as to third parties (Ch. VI., Sec. I.) 61
persons may be held as partners as to third parties who are not so between themselves 61
general grounds of liability 61
an absolute liability for the whole of every debt due from the firm rests upon each partner 61
a person may be charged either because he is a partner, or because he has been held forth as such with his knowledge and assent 61
but only to those who have trusted the firm on his credit . . 65
secret and known partners equally liable 61
when a partner is liable as actual partner 66
may by agreement made known to their customers qualify the obligations of one in reference to their customers . . . 67
a person receiving a specific proportion of profits as wages or compensation for services, is not made thereby a partner 51, 71, 92
so of a person working land, sailing a ship, hiring an inn, for a share of the profits 72
where persons make known an agreement to become partners, but have no actual community of interest, they are not in fact partners, but might be bound as such to those to whom they have so called themselves 87
where a person is held out as a partner with his own consent, he is liable as such 87
where a person declares, in a contract or elsewhere, that he is not a partner, but in fact is such, then liable 88

PARTNERS — *continued.*
difference between receiving gross receipts or net profits; cases examined . . . . . 88 n. (*q*)
every one who has a right to an account is not necessarily a partner 92
Stat. 28 & 29 Vic. ch. 86, intended to determine what participation of profits makes the taker liable as partner . 92 n. (*t*)
how far stipulations between, affect third parties 93
where parties enter into a contract of partnership, and also stipulations which in whole or in part deny or qualify the liability of some of them 93
where stipulations between partners are made known to third parties, they, generally, are affected by them 93
where there is a provision in articles that the partners would not come under liabilities, nor confer on each other rights and powers belonging to partnership 94
stipulations unknown to third persons inoperative as to them . 95
in relation to the business of the firm, every partner has full power to bind all the members of it 95
but he binds the firm only when he acts in and uses the name of the firm 95
authority of each partner, usually only an implied one . . . 95
inference of authority of each partner cannot be made when disclaimed by act and word 95
it is a question of fact, whether an alleged partner has disproved the evidence of authority on the part of his partners . . 95
a person may not at the same time secure the gains of partnership and guard against its losses 98
custom in Continental Europe to designate one of a firm, in a circular, as the partner having power to sign their name to negotiable paper 98
reason why all are bound by acts of one 101
firm may permit a partner to act for the firm, in his own name, 101
parties cannot enter into an unlimited partnership as regards its advantages, and at the same time protect themselves from its liabilities 102
if a partner exempted by agreement is made to pay any loss, he can recover it from his copartners 102
where a partner, in violation of his stipulations as partner, enters into a contract with a third person, effect of 103
where a person deals with a fraudulent partner, in an ignorance which implies gross negligence on his part, effect of . . 103
when credit is given to one partner only 103
where a creditor of a firm takes a judgment or bond against an ostensible partner 109
attempting to bind the firm by a specialty, but failing . . . 109
(*See* EQUITY.)
where using the credit of the firm for personal advantage, without authority 111

PARTNERS — *continued.*
where property is purchased by one partner in his own name with funds of the firm 113
a fraudulent use of the firm's name should be at once repudiated, 113
rights of seller who discovers that the orderer of goods and the receiver to whom he sent them were partners in the transaction 113
where the orderer and receiver were not to enter into partnership until the products which had been ordered were manufactured 113
where a person liable because he is held out as such 115
where a creditor seeks to put the liability of a partner on one who is only nominally a partner 119
where conversations and acts are insufficient to prove a partnership as between the partners, if third parties are not interested 122
every one authorizing another to believe him a partner, is liable as a partner as to such person 123
a partnership may have whatever name the partners choose, 125, 254
in assumpsit by a firm, plaintiffs must prove who constitute the firm 128
of the effect of using such a name as usually indicates a partnership 130
a partner with authority to act for the firm, whose name is used as the name of the firm, may by his representations bind the firm to an innocent party, however fraudulently he may act towards the firm 130
where the liability of, turns upon the force and meaning of his acts 132
where not liable as such, unless held out with his own concurrence 132
where a person signs his name to an instrument importing that the subscribers intend, upon the fulfilment of certain conditions, to enter into partnership . . . . . 132 n. (*s*)
where a person knew that he was held out as partner, but neither consented nor refused 134
chargeable because so held out, may be joined with the other partners in a suit against them; instances of . . 134 n. (*w*)
persons may sue and be sued as partners, where a contract is made with them as such 134
where a person lends money to a firm, and is to receive a certain share of the profits 141
shipment of goods on half-profits does not constitute a partnership 144
where the owner of a vessel lets her in consideration of a share of her earnings, this does not constitute a partnership, 144 n (*l*)
where a testator directs a certain amount to be retained in the old firm, his assets not liable beyond that amount . . . 147

PARTNERS — *continued.*
interference with, or even control of, the affairs of the partnership not sufficient to render a person liable as partner . . 147
joining in an order for any mercantile transaction not sufficient to render a person liable as 147
when and how far liable *in solido* for the torts of other partners, 150
liable for the tort of one, if committed by him in the partnership business 150
when liable *in solido* for the frauds of other partners, want of evidence that money raised by the fraud of one of the partners was applied to the use of the firm will not relieve the others from liability 152
where a partner steals money, and deposits it to partnership account, and innocent partners not liable 152
where liable, assumpsit for money had and received might lie . 152
where it was the business of the firm to receive goods on deposit, and one of the partners stole some of the goods so deposited, firm liable 153
where one of the firm, a trustee, applies the trust fund to the use of the partnership, firm liable if other partners knew and assented; whether liable if they did not know and assent, not settled 154, 155
to whom goods were consigned for sale, liable for the pledge thereof by a fraudulent partner 155
where, from the nature of the tort committed by one partner, it is shown to be only a several act, firm not liable. . . . 156
when liable *in solido* for tort, may be sued either jointly or severally 167
a release to one operates as a release to all . . . . . 157 n. (*i*)
case, the proper action against partners for injuries by their servants . . . . . 157 n. (*c*)
liable also in actions *quasi ex contractu;* which are, in fact, actions of contract 157
a person must become such by his own act 162
one has no exclusive right to any one particular portion of the stock of the partnership 167
how partnership property owned by 168
may sell his interest in the firm 168
foundation and general extent of the power of. 170
when a transaction by a partner with a stranger is foreign to the business of the firm, what duty of inquiry is on the stranger 175
after dissolution, for partnership debts may be regarded as joint contractors . . . . . 184 n. (*n*)
of the power to vary the business of the partnership 197
duties of partners as to each other 223
must not deceive his copartner 225
is not liable to copartners for an honest mistake 225
gaining, by a bargain with third persons, advantages which belong to the firm, must account to the firm 225

PARTNERS — *continued.*
obtaining goods for the partnership by barter of his own goods, effect of 226
how far may transact independent business 227
of allowance of interest 230
with the concurrence of all, may alter the terms in which they carry on business, at pleasure . . . . . 238 n. (*s*)
where one may refuse to pay to the firm money he owes . . 241
where money is advanced by the firm to one 241
agreement between, cannot affect the liability of their debtor . 330
separate property of a partner liable first to separate creditors of the partner 347
each partner liable *in solido* for the whole partnership debts . 349
right of, in the partnership property defined 350
right of, to disencumber his interest from the rights of the others 351
may sell out his interest to a stranger 352
such sale and transfer will not liberate his share from the debts of the firm 352
where a single woman is a, and marries, her husband cannot claim to be admitted as a partner 462
each partner is liable for all the debts of the firm; but as a principal debtor for his own share, and as surety for the other partners for the remainder 477
where one is defrauded into advancing money to become a, and the fraudulent party becomes a bankrupt 479
rights of, to property owned in his own right cannot be affected by allowing the firm to employ it on terms satisfactory to them and in perfect good faith 492
a transfer of property from the partnership to a partner in good faith, and without any expectation of bankruptcy, will be valid 492
where the several, in a firm, appear before the world as distinct traders 498
lien of, on the partnership effects, for the balance due them, enforced by a court of equity . . . . . 502 n. (*l*)
interest of, in a foreign enterprise not lost by the seizure of the goods, provided any part of them be restored 503
where resident in different countries between which war breaks out and the firm property seized by one country and compensation made to the partner resident there 504
right of, to an account 508
may transfer his right to an account to his representatives . . 508
duty of, to keep accurate accounts of all the business of the firm under their charge 509
an action will lie between, where a balance of accounts is struck . . . . . 510 n. (*d*)
cannot sue each other at law for any business or undertaking of the partnership . . . . . 510 n. (*d*)

PARTNERS — *continued.*
but may sue each other at law for a breach of any distinct engagement in the partnership agreement . . . . 510 n. (*d*)
PARTNERS IN A SHIP,
neither of them can make a claim against the other for expenses incurred about their common property 553
one partner in a ship may transfer the whole property, by way of a mortgage or pledge . . . . . 557 n. (*a*)
PARTNERS *INTER SE*,
on the remedies of (Ch. VIII., Sec. I.), general considerations, 267
a partner cannot charge the firm for the extra value of his services 223
of a suit against a partnership by the firm name 267
the law will seldom take cognizance of questions which relate to, 268
one partner may not maintain an action against the partnership, for his expenditures for the firm . . . . . 268 n. (*c*)
no account between, can be taken at law . . . . . 269 n. (*f*)
may sue each other on affairs not connected with partnership . 270
but not for money received on partnership account, unless all the accounts are adjusted 270
may sue each other on a claim arising before the partnership, although referring to it 271
account books, where admissible evidence 272
a partner redeeming lands is entitled to contribution . . 287 n. (*s*)
fraudulent purpose of the firm no defence to a bill by a partner for a settlement 295
PARTNERS, QUESTIONS BETWEEN,
of which courts of law take cognizance 270
PARTNERS, REMEDIES AGAINST 342
PARTNERS, REPRESENTATIONS AND ADMISSIONS OF,
evidence of private conversation not admissible to rebut evidence of partnership 13
general effect of conversations, admissions, &c. 122
as to debts barred by the Statute of Limitations . . . 184 n. (*n*)
to bind the firm, must be in the business of it and during its existence 184
if the partnership is in existence, a partner may revive a debt barred by the Statute of Limitations 189
but *aliter* if partnership is dissolved 190
after a dissolution, how far may affect former copartners, 191 n. (*p*)
after dissolution, as to balance of account . . . . . 191 n. (*p*)
relating to the business of the firm bind it 192
admissions of one not competent evidence of partnership to all . . . . . 194 n. (*r*)
but binding on him 195
if a partner has not received his certificate, his admissions, though made after bankruptcy, may bind the firm . . . . 195 n. (*t*)
where some of the firm are dormant . . . . . 195 n. (*t*)

PARTNERS, REPRESENTATIONS AND ADMISSIONS OF—*continued.*
of one who is not a party to the suit in which they are offered in evidence . . . . . 195 n. (*t*)
binding on firm, if relating to the transaction of its business . 197

PARTNERS, RIGHTS AND DUTIES OF,
between themselves, (Ch. VII.) 159
of the right of choice as to 159

PARTNERS, SEPARATE INTEREST,
not generally open to attachment or execution 355

PARTNERSHIP,
law of, a system by itself 2
Roman law, how far similar 2
not a modified tenancy in common nor a joint-tenancy . . . 2
what partnership is 6
how partnership may be made 6
may be made by agent 6
no partnership until some joint transaction has been undertaken, 6
contract of, usually in writing, not necessarily so 7
whether partnership exists, a question of fact; what it is, a question of law 7
may grow out of transactions or relations between parties, without express agreement 8
contract must be formed for a legal purpose 9
distinction between a partnership for objects *mala in se*, and one for objects only *mala prohibita* . . . . . 9 n. (*h*)
contract of, must be voluntary 11
no person can be introduced into a firm without the consent of all the members of it 10
consent may be implied, or inferred from acts 12
where articles of copartnership provide that a copartner may transfer his interest in the firm to a third person, who by force of the transfer becomes a copartner 12
an agreement to admit a new member into a partnership does not invest him with the character of a partner 12
existence of, how proved 12
contract of, avoided and annulled by fraud or coercion . . . 13
contract of, must be made by competent parties 13
equity may decree specific performance of a contract to enter into . . . . . 13 n.
when it begins; usually determined by contract of 13
presumption of law that it began when the written articles were executed 13
express stipulation, in contract of partnership, that it should have a retrospective effect, could not make them partners as to third persons, except from date 13
not created until all the conditions of the agreement are fulfilled, 14

PARTNERSHIP — *continued.*
when it begins, where implied by law from certain transactions, 14
purposes and kinds of 36
may be for buying and selling land 37
for buying and selling land, affected by the Statute of Frauds. 37
(*See* STATUTE OF FRAUDS.)
may be general or special 38
an instance can seldom if ever occur of universal partnership . 38
the rights and obligations of partnership exist only so far as the partnership extends 40
no distinct dividing line between general and special 40
may exist for other purposes than buying and selling; as professional partnerships 42
where a product arises from a contribution to the common stock of different things by the different partners 43
where such a product is to be divided between them and not for sale, there is no partnership in the product 44
may be in property and profits, although bought by funds of one partner. 47
may be in the profits where none in the property 48
not necessary that it should cover the whole ground of the kind of business done 51
community of interest in the profits essential to 67
generally, community of interest in the profits will suffice to constitute partnership 67
when it begins with the effect of casting upon the members the liability of partners 113
where a person purchases goods upon his own credit, and it is afterwards discovered that they have been applied to the use of a partnership 113
where no partnership is in contemplation when the goods are obtained 114
where the circumstances attending the transaction indicate a partnership, it will be held to exist; instances of . 128 n. (*o*)
to what extent *quasi* corporations 171, 267
of the power to vary the business of 197
where a partner enters into a new branch of business in the name of the firm 198
that every person is presumed to know the law of partnership . 233
renewal of 239
where limited to a certain time continues after that time without new articles, or a formal renewal of the old ones, presumption that old articles continued in force, except as to limitation of time 239
continued on old articles is dissolvable at the will of either partner 240
where the fact of, is disputed 322
change of, discharges a surety to 333
contracts by, for insurance on property of the firm 335

PARTNERSHIP — *continued.*
when illegal 341
as a tenancy in common or a corporation 343
where a partner's interest in the firm property has been attached for a private debt 357
cannot hold the legal title of real estate, but may the equitable title 366
extent and duration of 379
once formed presumed to continue 380
dissolution of, how it may take place 380
where formed for a single adventure 384
may continue by express or implied agreement 384
of a change in the partnership and its effect 406
dissolved by the marriage of a partner who is a single woman . 462
where one person is a member of two firms, whether and when one firm can prove in bankruptcy against the other . . . 480
where one firm is liable for the joint debts of another, it cannot prove against the estate of that firm, in competition with the creditors 480
where any person holds his property out as partnership property, 495
upon dissolution of, each partner has a lien on the partnership effects for his indemnity, and for his proportion of the surplus . . . . . 502 n. (*l*)
where some of the members of a firm carry on an entirely distinct business, and the two firms deal with each other, in case of bankruptcy one may prove against the other . . 501
or the creditors of either may prove against its own fund . . 501

PARTNERSHIP LIMITED. (*See* LIMITED PARTNERSHIP.)

PARTNERSHIP PROPERTY,
each partner owns the whole, subject to the rights of the others; and no one can commit burglary or larceny on the property of the firm 168
what constitutes 256
in general, whatever belongs to the firm 256
may be real property 256
when property becomes 259
consists of 257
property given or devised to a partner does not thereby become, 257
seized in time of war, and afterwards one partner's share restored to him; the goods restored held never to have lost their character of . . . . . 257 n. (*n*)
where a personal office is purchased with partnership funds, for the benefit of the partnership 258
partners may agree to own in any proportions they please . . 258
(*See* PRESUMPTIONS OF LAW.)
the good-will of the business is partnership property 263
trade-name whether partnership property 265
trade-marks are so 265

PARTNERSHIP PROPERTY — *continued.*
can be no division of until all the accounts of the partnership have been taken . . . . . 512 n. (*h*)

PART-OWNERSHIP OF SHIPS,
peculiar nature of 548

PART-OWNERS OF SHIPS, Ch. XIX. 548
more than ordinary tenants in common, but not so much as partners 548
may be tenants in common as to the ships, and partners as to their cargoes or earnings 549
different ways in which they may acquire their interest . . . 550
rights and relations the same whether they arise in one way or another 550
not necessarily partners, though they may be partners . . . 550
the presumption of law would be against a partnership of . . 551
may be partners as to an adventure or enterprise, and yet remain part-owners as to the ship 551
possess some of the powers and rights of partners 552
their names and respective shares should be inserted in the register 552
rights and obligations of, in relation to each other 553
one may have a claim, at law, against the other for his share of expenses incurred in making repairs about the common property 553
to obtain an adjustment of the ship's accounts, proceedings between may be instituted in equity . . . . . 553 n. (*m*)
where one part-owner incurs expenses for repairs, without the consent of the other owners 554
a part-owner may sell his share to any person, and on any terms, at his own pleasure 555
a part-owner has no power over the shares of the other owners, 555
where they are partners, the right of one to sell the ship . . 556
where, if one part-owner did sell the ship, the other owners might bring trover against the seller 556
at common law, one part-owner of a ship cannot wrest the possession of it from the hands of another 556
a part-owner, in order to gain possession of the ship, must go into admiralty 556
one part-owner cannot transfer the whole property, by way of mortgage or pledge 556
one part-owner cannot recover damages against another, for fraudulently sending the ship on a foreign voyage and causing her loss 557
nor for careless management whereby the ship was lost by fire 557
one part-owner has no authority to insure the interest of the others for them, although he be ship's husband 557

PART-OWNERS OF SHIPS — *continued.*
a part-owner may sell or transfer his whole interest, or it may be taken from him by a creditor, and it passes by death or bankruptcy to his representatives 557
where they differ as to the employment of the ship, admiralty interferes 558
power of the managing owner when the part-ownership is dissolved 558
where the majority wish to use the ship in any particular way . 559
where the master is a part-owner 561
where a majority wish to displace the master, who is a part-owner 562
cannot sue each other for injury to the common property, unless it amounts to destruction 562
where a part-owner detains a ship, and prevents a voyage towards which the others have contributed, without notice of dissent from him 562
where a part-owner dissents, and a voyage is undertaken and the ship is lost 562
each must account for any profits received 563
of the lien of 563
have no lien on the ship for a balance arising from accounts independent of it 563
nor for a balance arising from charges for the ship itself in former voyages 564
rights and obligations of, as to third parties 564
power of a part-owner to represent the other owners . . . 564
power of a part-owner, in the absence of the other owners, to make contracts to repair the ship 565
where credit is given to the part-owner dealing, no others are holden 566
will not be discharged only because the debt is charged to the master or other agent . . . . . 566 n. (*p*)
where one part-owner dissents from an act of another, and cannot then be bound for it 567
one part-owner cannot bind the others by any act which does not rest on necessity or certain expediency 568
how far bound for the torts of each other and their servants . 571
PATENT RIGHTS,
held by partnership 265
PAYMENT,
effect of, to a partner after dissolution 396
payment to partner who is insolvent, effect of 396
to the executor of a deceased partner 396
PAYMENTS BY A FIRM,
after the death of a partner, when one of the firm is executor of the deceased, shall not be considered as payments by that partner as executor, if they have the effect of barring the Statute of Limitations 451

PENALTY,
for wrong-doing, cut down to a compensation 250

PENNSYLVANIA,
statute of April 14, 1838, concerning abatement of actions against partners . . . . . 288 n. (*t*)

PERSONAL PROPERTY OF A PARTNERSHIP,
what it consists of 256

PERSONAL REPRESENTATIVE. (*See* EXECUTORS.)

PERSONS UNDER GUARDIANSHIP,
spendthrifts 29
drunkards 29
when partnership avoided by temporary intoxication . . 29 n. (*i*)

PLAINTIFF,
making a bankrupt partner who has been discharged a defendant will have judgment against all the partners but him . . 475

POLICY OF INSURANCE. (*See* INSURANCE.)

POWER OF A PARTNER,
foundation of 170
(*See* PARTNER.)
to bind the firm in the regular course of the business. . 170 n. (*v*)
rests on property, as well as agency 170
general extent of 171
how qualified 172
extends over all contracts within the business of the firm . . 172
to receive payment of debts due the firm . . . . . 172 n. (*w*)
to compromise debts . . . . . 172 n. (*w*)
to release a debt . . . . . 172 n. (*w*)
to represent the firm in legal proceeding . . . . . 172 n. (*w*)
to release an action . . . . . 172 n. (*w*)
to release the acceptor of a bill from an action on it by the firm . . . . . 172 n. (*w*)
to give time to a debtor . . . . . 172 n. (*w*)
where the firm engages in any business outside of its regular business; instances of . . . . . 172 n. (*w*)
to act for the firm in a suit; exception . . . . . 172 n. (*w*)
under the bankrupt laws . . . . . 172 n. (*w*)
to appoint an agent to transact the joint business . . . 172 n. (*w*)
to bind the firm, only extends to acts within the regular business of the firm; instances of . . . . . 175 n. (*x*)
to submit to arbitration 176
where such submission would be held obligatory 177
to affix a seal 178
contracts of a firm must be unsealed 178
not sufficient to affix the seals of his copartners, or of any of them . . . . . 178 n. (*g*)

POWER OF A PARTNER — *continued.*
cannot bind the firm by a sealed instrument, but would bind himself . . . . . 178 n. (*g*)
to bind his copartners by a specialty, must be given him for that express purpose . . . . . 180 n. (*i*) 181
to authorize an agent to bind the firm by the discharge of a debt due it . . . . . 182 n. (*k*)
limited by business of the partnership 199
to put the name of the firm to negotiable paper implied . 199 n. (*a*)
of not strictly trading partnerships, no such power *primâ facie* . . . . . 199 n. (*a*)

POWER OF A PART-OWNER,
in the absence of the other owners, to make contracts concerning the ship 565
by what contracts or acts he may bind the other owners . . 568
(*See* PART-OWNERS OF SHIPS.)

POWER OF APPOINTMENT,
when given by the articles 451
if no agreement is made between the partners to that effect, no one has any 451

POWERS OF A MAJORITY,
provisions for 249
where given by articles 249
will not be extended by implication 249
confined to matters in the conduct of partnership business . . 249
acting under articles, in case of difficulties between partners . 249

PRESUMPTION,
of fraud, never absolute 112
(*See* FRAUD.)

PRESUMPTIONS OF LAW,
where a partner gives an obligation of the firm for a debt due by himself 111
where a partner releases a debt due to his firm, in consideration of the release of a debt due by him 112
absolute, that a person is a partner, where held out as such with his assent 119
that a person who is charged as partner, because held out as such, was so held out with his own consent 133
where a partnership exists as to third parties, law presumes *primâ facie* a partnership as between themselves . . . 135
in favor of an equality of interest in case of partnership property . . . . . 258 n. (*o*)
(*See* PARTNERSHIP PROPERTY.)
may be rebutted by evidence of modes of dealing from which a contract may be implied 259
that an infant remaining in a firm after full age confirms the debts contracted during his minority 437

PRESUMPTIONS OF LAW — *continued.*
that the credit is given to the part-owner against whom the charges are made 566

PRINCIPAL. (*See* SURETY.)

PRIVATE CREDITOR, SUIT, ATTACHMENT AND LEVY OF,
against a partner personally indebted to him 350
can secure the right his debtor has, and only that 350
may attach the interest of the debtor partner in the partnership property 352
attachment of interest of a partner by his private creditor when avoided in favor of joint debtor 353
where he attaches a definite portion of the partnership goods . 352
how far affected by a private agreement between partners . . 354
when he may attach a partner's separate interest 355
when and how he may levy on the partner's interest in the copartnership property 357
manner of enforcement of his right 358
purchaser at a sale by execution of a partner's interest would not be a partner 359
attachment of a partner's interest by his separate creditor avoided by insolvency of the partnership 360
in case of a dormant partner 360
may not prove in bankruptcy, under a joint commission for the purpose of voting in the choice of assignees 484
where a firm is indebted to one of the partners, his private creditor may not prove his debt against the joint fund . . . 500
of a partner may proceed against the joint estate at bankruptcy, if it is larger on account of any fraudulent act against that partner 500
where joint creditors elect to proceed against the several estate of an ostensible partner, and not against the joint fund, private creditors of that partner may proceed against the joint estate for an equal amount. 501

PROFESSIONAL PARTNERSHIPS 43, 156
good-will of firm 264

PROFITS,
agreeing to pay a person a certain part of the profits does not necessarily give him an interest in them as profits, or make him a partner 69
gross profits or net profits 88

PROMISE,
where new, and no new consideration 110

PROMISE OF INFANTS. (*See* INFANTS.)

PROMISSORY NOTE,
where given in the partnership name partly for a partnership debt and partly for a separate debt of one of the partners, 112 n. (*s*)

PROMISSORY NOTE — *continued.*
where the language of, is, "I promise to pay," but it is signed by the partnership name . . . . . 127 n. (*k*)
where on its face it purports to be the act of one partner, and made to secure his individual debt . . . . . 127 n. (*k*)
where signed jointly, not evidence of copartnership between the parties . . . . . 148 n. (*w*)
has been held otherwise where they signed a bill of exchange . . . . . 148 n. (*w*)
making use, and indorsing of . . . . . 199 n. (*a*)
when made or indorsed fraudulently 211
oint and several by all the members of the firm, not a partnership note 215
in case of insolvency signed by some of the partners, only effect of 215
non-negotiable, assignee of . . . . . 289 n. (*u*)
where the holder is a member of a firm which is the first indorser . . . . . 289 n. (*u*)
when made by one who is a member of two firms, in the name of one firm, and payable to a member of the other . 289 n. (*u*)
if indorsed in blank, may be sued by any holder, in his own name, 333
indorsed by a firm before dissolution, but negotiated afterwards, 391
effect of parol authority to continuing partners to sell note made to the firm before dissolution 392

PROVISIONAL COMMITTEE,
a new member of a, not liable for services performed after he joins, if the order had been given previously to his joining . . . . . 433 n. (*y*)

PROVISIONS,
for the determination of differences by arbitration 247
Common Law Procedure Act, 11th sec. — 17 & 18 Vic. ch. 125 . . . . . 247 n. (*r*)
(*See* ARTICLES.)

PUBLIC PARTNERS,
how different from ostensible 30

PUBLICATION OF RECORD OF LIMITED PARTNERSHIPS.
(*See* LIMITED PARTNERSHIP.)

PURCHASE,
by one partner in the course of their regular business binds the firm . . . . . 163 n. (*g*)

PURCHASER,
of a partner's interest in a firm, under execution, not made a partner thereby 359
right of, to call for an account 359

R.

RATIFICATION,
by adult of acts done while an infant. (*See* INFANT.)

REAL ESTATE,
when and by what means real estate becomes partnership property 363
not always material how bought, or how conveyed to the partnership 364
will not be presumed to belong to one partner 365
ownership of, determined by intention of the partners . . . 366
title of, in law, cannot be held by a partnership 366
where purchased by the general partners of a limited partnership, 539

REAL ESTATE OF A PARTNERSHIP 362
general considerations (Sec. I.) 362
how courts of law treat (Sec. III.) 366
no partner can convey real estate not held of record in his name, 367
where devised by the legal holder 368
when and how Statute of Frauds would apply to transfer of . 368
as to dormant partners 368
who must convey 369
is considered in equity as part of the partnership stock, and subject to partnership debts . . . . . 441 n. (*o*)
may not be claimed either by the widow or heirs of a deceased partner until the claims of the firm creditors are satisfied, 441 n. (*o*)
surviving partners have an equitable lien on, for the debts of the firm . . . . . 441 n. (*o*)
effect of acts of partners, as to
(*See* REAL ESTATE OF A PARTNERSHIP, HOW TREATED IN EQUITY.)

REAL ESTATE OF A PARTNERSHIP, HOW TREATED IN EQUITY 369
how far regarded as personal estate 369
effect of Statute of Frauds 7, 368
rule in England 369
to whom it descends in England 371
American rule 371
of dower 372
English rule, as to dower 372
American rule 373
where the property passes out of the partnership to a stranger, 373 n. (*d*)
of inheritance 373
the heir holds as trustee for the firm or their creditors . . . 373
when it cannot be sold to pay debts until the personal property is exhausted 373

REAL ESTATE OF A PARTNERSHIP, HOW TREATED IN EQUITY — *continued.*
conveyed to partners as tenants in common, and one of them dies 374
lands conveyed to partners as joint tenants 374
land devised to partners for partnership purposes 374
right of creditors of the firm to its real estate 375
personal estate first applied to the payment of the debts . . . 376
death of a partner holding the firm's real estate . . . 376 n. (*r*)
right and power of the partners as to the real estate of the partnership 376
one partner may not transfer the real estate of the firm . . . 376
where a partner sells his interest in, to a stranger 377
conveyance of, to a stranger 377
conveyed by the partner holding the legal title, to a purchaser without notice, for value 377

RECEIVER,
a decree for, its effect 312
appointment of, ousts a partner from all control 312
appointment of, when and why made 313
exclusive possession by one partner is not of itself sufficient cause for appointment of 314
where the party applying for, has the property in his own possession . . . . . 315 n. (*s*)
appointment of, temporary 315
where appointed to wind up a business 315
application for, addressed to the discretion of the court . 316 n. (*x*)
may be appointed, although there is only one acting partner . 317
who may be appointed 317
may earn interest on the money, if not prevented by the terms of the appointment 318
powers and duties of 320
the property which a receiver takes into his possession . 320 n. (*p*)
trustee of all the assets for the firm creditors 320
rule governing a receiver 320
appointment of, in certain cases, operates a dissolution . . . 470

RELEASE,
where two are arrested on a joint *ca. sa.*, and the plaintiff's discharge of one of them is a discharge of the other . 172 n. (*u*)
of one partner of a joint debt, to have the effect of discharging the firm, must be under seal . . . . . 172 n. (*u*)
to one partner may be accompanied with such conditions as to prevent its discharging the firm . . . . . 172 n. (*u*)
where given by one partner for a consideration which is known to inure only to his own benefit 210
of a debt of the firm by one partner . . . . . 325 n. (*l*)
where an assignment of property has been made . . . 329 n. (*o*)

REMAINING PARTNER. (*See* RETIRING PARTNER.)

REMEDIES BY PARTNERS AGAINST THIRD PARTIES, Ch. IX. 325
for breach of contract 325
two firms having a common partner . . . . . 325 n. (*b*)
where a party has a defence against one of the partners . . . 325
where a partner releasing a debt is a dormant partner . . . 326

REMEDIES OF THIRD PERSONS AGAINST THE PARTNERSHIP AND AGAINST PARTNERS, Ch. X. . . 342

RENEWAL OF PARTNERSHIP,
by tacit continuation of business 239
when a tacit renewal, it is dissolvable at will of either partner . 240
(*See* PARTNERSHIP.)
renewal of limitation of time seldom presumed from acts . . . 240

REPAIRS,
if made by a part-owner of a ship, he has a claim against each of the others, for his share of the expense, at law . . . 553

REPUTED OWNERSHIP,
statute of 6 Geo. 4, ch. 16, § 3 . . . . . 494 n. (*g*)
statute of 6 Geo. 4, ch. 16, § 72 . . . . . 495 n. (*u*)

RETIRING PARTNER,
one leaving an existing firm 34
in law, retirement of any partner terminates a partnership . . 34
how retirement affects the liability of 408
neither loses property nor relieves himself from liability . . . 409
if he pays more than his share of the old debts, may have contribution from his partners 409
where he "sells out" 409
may set up the same business in the immediate vicinity, in the absence of any agreement 409
effect of promise of, not to carry on the same business . . . 409
when obligation of, is determined by the language of the articles, 410
how he may terminate his liability for the partnership debts . . 410
notice of retirement must be given by 411
manner of giving notice of retirement 411
difference in liability of, as to old and new customers 412
rule as to notice of retirement 412
where knowledge is equivalent to notice 397
consenting to a use of his name by the old partners 414
where a dormant partner 415
liability of, when an existing contract contemplates future payments to any extent 417
notice of retirement by notoriety 418
sufficient lapse of time may supply want of notice 418
cases in which a jury might infer knowledge of the retirement . 418

RETIRING PARTNER — *continued.*
must show that the notice of retirement was such as the usage of merchants requires 418
right of action against remaining partners for breach of contract to pay the debts 421
when discharged by creditors 421
agreement between him and those who remain, of no effect as to creditors 421
should be included in any action against the firm, for a debt contracted while he was a partner 421
execution against the firm may be satisfied from property of . 421
where held only as surety for the firm debt 424
where a creditor retains the old securities against the firm . . 424
where a creditor expressly retains his rights against 425
the creditors receiving interest from the new firm will not necessarily discharge 425
facts from which a jury might find an implied assent to discharge of 426
liability of, for trust money used in the partnership by one partner, with the knowledge of all 426
when discharged by appropriation of payment 427
when a partner puts into the firm the money of a stranger, this does not make the stranger a partner 427
liability of, for existing debts 429
not liable for debts created after his retirement 429
when money is paid after his retirement, right of the new firm to appropriate it 429
not bound by an appropriation of payment, fraudulent or injurious as to him 429
where the new firm, for adequate business causes, appropriated the funds of the old firm to the payment of new debts . . 430
when permitted to prove his claim against a bankrupt partner . 478
where he has a covenant with the remaining partner to pay all the debts, and, the remaining partner becoming bankrupt, he pays them, may prove them against the bankrupt's estate, 479
who leaves his property in the possession or at the disposal of the firm, liability of 496
must give notice of his retirement, and of the purposes and limitations under which he leaves his property in the firm . . 497
leaving some of his property with the firm, and giving notice that the property so left is his, and not left for the firm to obtain credit on, may protect it from future creditors . . 497

RIGHTS OF PROPERTY OF PARTNERS *INTER SE*, Ch. VII., Sec. VIII. 256

S.

SALE,
on execution of one partner's interest 400
secret, unaccompanied by possession, is *primâ facie* fraudulent and void as to creditors of the firm . . . . . 496 n. (*w*)
of the effect, in a bankruptcy 506
where only a part of the partners are bankrupt, the assignees have no right to sell 506
but the court will decree a, if the assignees request it for a good cause 507
may be decreed as a preliminary proceeding, or means of making account 524
(*See* ASSIGNING AND TRANSFERRING PROPERTY.)

SALE OF PARTNERSHIP PROPERTY.
(*See* DISSOLUTION.)

SEAL,
belongs to the common law, while partnership belongs to the law-merchant 182
when regarded by courts as surplusage 183

SECRET PARTNERS,
who are 30
the word "Co." not necessary to bind all the partners . . . 31
why liable 31
where announced to a customer, without his own consent . . 31
where he permits himself to be made known 31
liable upon all the acting partner's contracts, made within the scope of the partnership business 62

SECURITY,
several security of one partner, accepted by a creditor holding the joint security of the firm does not discharge the firm, 110
where a partner disposes of security belonging to the firm, for his own debt 209

SELLER,
of goods to one who orders them sent to another, who is in fact his partner 113
(*See* PARTNERS.)

SEPARATE CREDITOR. (*See* PRIVATE CREDITOR.)

SERVICE OF PAPERS,
as to partners . . . . . 172 n. (*w*)

SETTLED ACCOUNT. (*See* ACCOUNT STATED.)

SETTLEMENT BETWEEN PARTNERS.
(*See* ACCOUNT STATED.)

SETTLING PARTNER,
power of 392

SEVERAL CREDITORS,
who are 484

SEVERAL PARTNER,
may sue at law on demands against a partner or partners, when they are distinct from the affairs of the firm 270
where a partner may sue a partner, on any claim arising before the partnership, although it refers to the partnership . . 271

SEVERAL PROPERTY,
what is 491

SHAREHOLDER. (*See* JOINT-STOCK COMPANY.)

SHARES. (*See* PART-OWNERS OF SHIPS, AND JOINT-STOCK COMPANIES.)

SHIPS,
are personal chattels 549
are like real estate, in some particulars 549
must be registered, before they become entitled to the privileges of American ships 549
English statutes require registration to make a transfer of a ship valid 549
all transfers of ships, by way of mortgage or pledge, must be registered 550
employment of, where the owners differ 558
(*See* PART-OWNERS OF SHIPS.)

SHIP'S HUSBAND,
who is 569
not necessarily an owner 569
duties and powers of 569
if not a part-owner, all are responsible to him *in solido* for his charges within the scope of his authority 569
if he be a part-owner, then each owner is liable to him only for his share 569
may sue any part-owner who refuses or neglects to pay his share 569
has a lien on the proceeds of the ship, or the documents of title, for indemnification upon his lawful obligations for the ship 570
lien of, does not extend to the ship itself. 570
appointment of, may be inferred 570
duty of 570
cannot insure other owners, nor give up their lien of the ship on the cargo for freight, nor borrow money, nor delegate his authority 570
cannot begin and prosecute an action at law, without express authority from the other owners 570
where any of his acts are ratified by the part-owners . . 570 n. (*e*)

SIGNATURE. (*See* PARTNERS, AND POWER OF PARTNERS.)

SILENT PARTNER,
is one who takes no active part in the business of the firm . . 32
whether his name be made known as a partner or not . . . 32

SKILL. (*See* PARTNERSHIP AND PARTNERSHIP PROPERTY.)

SOLVENT PARTNERS,
effect of bankruptcy of a partner upon 471
hold the effects and property in somewhat the same way that surviving partners do 472
cannot get the firm property out of the hands and possession of the assignees of the bankrupt, the right to possession being the same 473
continuing the business without winding up the concern, do so at their own peril 474
have possession of, and full power over, the partnership effects, 476
hold the effects of the firm as trustees for all interested . . . 476
committing actual or constructive fraud, liable in damages, or it may be avoided by those whom it injures 477
rights of, against the estate of a bankrupt partner 477
cannot prove against the joint-fund in competition with joint-creditors, but may with several creditors 502
when rights of, against their insolvent partners are prior to the several creditors of the insolvent 502
cannot resist a bill by the assignees of the bankrupt for a share in the profits of a subsequent trading, on the ground that the assignees did not require an immediate settlement . . 505

SPECIAL PARTNER,
definition of 35
must see that all the requirements of the statutes respecting limited partnerships are complied with 532
if he withdraw any part of the capital, and the firm becomes insolvent, he is liable to the creditors for the amount so withdrawn, with interest 532
where the general partner withdraws some of the capital, without the consent or knowledge of the 533
if his name is used in any contract with his consent, or if he take an active part in the formation of any contract, he is liable as a general partner 533
when and in what manner he becomes liable as a general partner . . . . . 535 n. (*p*)
liable as general partners in all things, except those in which the statute expressly limits their liability 535
bound, after dissolution, for the future debts of the firm, unless notice is given, or it ceases by limitation of time or act of the law 536
notice should be given, in case of death or bankruptcy . . . 536

SPECIAL PARTNER — *continued.*
if they make themselves generally liable, after dissolution, to the holders of notes, the holders cannot come in and claim the joint assets equally with the previous creditors of the firm 537
holders of such notes should join all the partners in a suit . . 537
not liable as general partners because real estate had been purchased by the general partners, and paid for by the firm, and the title taken in the names of all the partners . . . 539
liable as general partners, where there was a mistake made in the publication of a certificate 539
(*See* LIMITED PARTNERSHIP.)

SPECIAL PARTNERSHIP,
relates only to a single transaction, or the use of one thing . 38
where a note or bill is signed or indorsed by two or more persons 39

SPECIFIC PERFORMANCE OF ARTICLES,
bill in equity for 234

SPECIFIC PERFORMANCE OF CONTRACT,
decree for 297
enforced in equity; instances of . . . . . 297 n. (*o*)
in what cases enforced 298
(*See* EQUITY.)

STATES,
are foreign to each other in respect to bankrupt laws . . . 474

STATUTE,
28th & 29th Vic. ch. 86, provides that lending money to a firm, the lender to receive a certain share in the profits, does not make him liable as a partner . . . . . 92 n. (*t*)
of Kentucky, promissory notes have all the legal effect of bonds under seal . . . . . 183 n. (*m*)
9 Geo. 4, ch. 14, on limitations . . . . . 184 n. (*n*)
of New Hampshire, concerning actions between copartners . 285
of Pennsylvania, April 14, 1838, concerning abatement of actions against partners . . . . . 288 n. (*t*)

STATUTE OF LIMITATIONS.
(*See* LIMITATIONS; LIMITATIONS, STATUTE OF; AND PAYMENTS BY A FIRM.)

STATUTES,
of the several States, in regard to limited partnership . 530, 532

STIPULATIONS,
as to retrospective effect of contract of partnership 13
between partners, how far they affect third parties 93
(*See* PARTNER.)

STIPULATIONS — *continued.*
notice of, to one member of the firm . . . . . 95 n. (*b*)
between partners exempting some of the firm from liability of, no effect as to creditors 102
between partners, violations by one, effect of 103

STOCK. (*See* PARTNERSHIP PROPERTY.)

STOCKHOLDER,
of a joint-stock company by a transfer, may give good title in the property to his transferee 546
(*See* JOINT-STOCK COMPANY.)

STRANGER. (*See* DILECTUS PERSONARUM, AND PARTNERS.)

STYLE OF FIRM. (*See* NAME OF FIRM.)

SUBMISSION. (*See* ARBITRATION.)

SUB-PARTNERSHIP,
duration and effect of 383

SURCHARGE,
what it is 517

SURETY,
no partner may become surety for a debt, and thereby bind the firm 216

SURVIVING PARTNERS,
powers and interests of 440
at the death of a partner, have an exclusive right of possession and management of the firm property and business for closing the same 440
if the authority of, for winding up the concern, be unduly exercised, the remedy is by applying to a court of equity for the appointment of a receiver . . . . . 440 n. (*l*)
where the articles provide what shall be done if a partner dies, 440
where a partner absconds 440
are tenants in common of the partnership property 440
have a right to collect all debts due to the firm, and to sell the property of the firm 441
where the deceased partner, by his will, provides for the continuance of his interest in the partnership 441
the tenancy in common of, exists only as to the property, and not as to the possession 441
rights of, to possession of the partnership property 441
have a lien on the real estate of the firm for indemnity against firm debts . . . . . 441 n. (*o*)
are from the death of a partner, trustees for all concerned in the partnership 441
may not sell to nor buy the property of the firm themselves . 442
power of, to arrange and settle all the debts of the firm . . . 442
equity will interfere, in cases of negligence or gross mistake by, 442

SURVIVING PARTNERS — *continued.*
may only claim their shares of the firm property, after the creditors have all been satisfied 443
are not bound to continue the business 443
equity will restrain the, from continuing business under the credit, and risking the effects of the old firm 443
where the surviving partners continue business under the credit and risk the effects of the old firm, they will be bound to account for the profit as belonging to the firm 443
if they incur a loss, they are charged with interest on the funds they use 443
but if they make a profit, which is credited to the firm, they may be allowed some compensation for their services 443
do not bear more than their share of the losses resulting after the death of the deceased from transactions entered into before 443
may be allowed for their time and expenses under certain circumstances 443
may retain the good-will of the firm, without payment on their part 444
have no right to take the effects of the firm at a valuation . . 445
creditors of the firm can bring their actions only against . . 447
actions to collect a partnership debt must be brought in the name of the 447
holding claims against the deceased partner are treated like other partners 450
when the deceased has made the surviving partner his executor, 450
(*See* EQUITY.)

T.

TENANT IN COMMON,
liability of, to his co-tenant for the destruction of the common property 323
land conveyed to partners as 374
may have all the incidents of joint-tenants by agreement of the parties 548
may bring trover against his co-tenant for an actual destruction of the chattel 556

TERM OF PARTNERSHIP. (*See* ARTICLES OF DISSOLUTION.)

TORTS,
in order to render partners liable for the torts of each other, they must have been committed in the partnership business, 150 n. (*d*)
where money, procured by fraud, becomes partnership stock, the firm not liable, without their consent to the fraud . . . 152
remedies of partners against third persons for 337
instances of, in which all the partners must join 338
against only a part of the members of a firm 338

TORTS — *continued.*
no contribution for payment of judgment founded on . . 287 n. (*s*)
demand of the firm grounded on the tort of a member thereof . 263
(*See* PART-OWNERS OF SHIPS, AND PARTNERS.)

TORTS BETWEEN PARTNERS 321
where the torts are personal 322
trover will not lie by one partner against his copartner . . . 324

TRADE NAME,
of the use and right of 265
false or injurious use of 265

TRANSFEREE,
of interest of one partner does not become a partner, without the consent of the other partners 169
may require an account and settlement 169

TRANSFER OF INTEREST IN PARTNERSHIP PROPERTY.
(*See* ASSIGNMENT.)

TRANSFER OF SHARES OF JOINT-STOCK COMPANIES,
where a statute prescribes certain forms for, they must be complied with . . . . . 546 n. (*n*)
when transferee would not be a partner, nor have any claim against the company to become such 546
a transferee may require an account and settlement so far as to ascertain his rights and the value of his share 546
transferee has no right to any particular thing in special, nor a division of the effects 546
when the company might refuse to accept transferee, as a partner, although the stockholders transferred his share agreeably to the rules of the company 546
transferee not bound to become a partner, although the company were willing to receive him 547

TRANSFER OF SHIPS,
by way of mortgage or pledge, must be registered 550
in England, must be registered 549

TRANSFERRING PROPERTY,
right of, extends to choses in action . . . . . 163 n. (*g*)
one partner may bind his firm by assenting to the transfer of a debt due on account . . . . . 163 n. (*g*)
right of, not affected by a secret act of bankruptcy previously committed by another partner . . . . . 163 n. (*g*)
nor by the fact that the proceeds of transfer have not come to use of the firm . . . . . 163 n. (*g*)
no difference as to right of, between partnership for general purposes and one for special purposes . . . . . 163 n. (*g*)
right of, does not extend to real estate of the firm . . . 163 n. (*g*)
where done in fraud of other partners, still valid as to innocent transferee 164

TRANSFERRING PROPERTY — *continued.*
qualifications of a partner's right to transfer his interest in the property of the partnership 169
where one partner transfers his interest in a chose in action to his copartner 329

TROVER. (*See* PART-OWNERS OF SHIPS.)

TRUST,
where implied as to holder of legal title to real estate, in favor of a partnership . . . . . 365 n. (*k*)

TRUSTEE.
a plaintiff cannot summon himself as . . . . . 288 n. (*t*)
a receiver appointed in a partnership suit becomes a trustee for the firm creditors . . . . . 320 n. (*q*)
where a partner is, and uses the trust money, with the consent of the firm, in the business 426
when adjudged a partner 145
when charged, as partner with *cestui que trust* 145
when he lends money to his firm, and takes their note running to the *cestui que trust*, effect of . . . . . 146 n. (*q*)
where one trustee forged the names of his co-trustees to a power authorizing his copartners to sell, firm liable 153
where one of a firm, a trustee, with the knowledge of the other partners, applies the trust fund to the use of the partnership, firm liable 154
if trust money be put into trade without authority, the *cestui que trust* may either take a share of the profits or the interest, 155 n. (*z*)
how far partners are 231
surviving partners are, for all parties in any way interested in the partnership 441
surviving partners as, cannot sell to, nor buy property of, the firm themselves 442
(*See* EXECUTORS.)

U.

UNIVERSAL PARTNERSHIP,
strictly, can be none 227

USURY,
when principal is at hazard, there can be no usury . . 141 n. (*e*)
borrower may plead usury against the lender . . . . 142 n. (*i*)
when lender cannot plead usury against a third party seeking to charge him as a partner . . . . . 142 n. (*i*)
where the contract is that the lender shall have legal interest, and also a share in the profits 142

V.

VALUATION,
taking share at 445
(*See* BANKRUPTCY AND SURVIVING PARTNER.)

W.

WAGES. (*See* PARTNERS.)

WAIVER,
courts of equity sometimes imply from the facts 238
of provisions in the articles 238

WAR,
effect of 27
(*See* DISSOLUTION AND ALIEN.)

WARRANTY,
by a partner, effect of 217

WIDOW. (*See* REAL ESTATE.)

WINDING UP
the affairs of the partnership 388

WITNESS. (*See* EVIDENCE.)

WRITING,
not necessary to constitute a partnership 7
(*See* PARTNERSHIP AND ARTICLES.)

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